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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 268

PACIFIC FAR EAST LINE, INC., a corporation,
Petitioner,

vs.

JOHN WILLIAMS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

PACIFIC FAR EAST LINE, INC., a corporation,
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vs.

JOHN WILLIAMS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Pacific Far East Line, Inc., respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on May 23, 1956, affirming the judgment of the United States District Court for the Northern District of California, Southern Division.

OPINIONS BELOW AND JURISDICTION

No opinion was filed in the United States District Court for the Northern District of California and consequently there are no reports.

The opinion of the Court of Appeals was filed May 23, 1956, and is unreported. A copy is reproduced in the appendix.

On June 20, 1956, an order was entered by the Court of Appeals staying issuance of mandate pending the filing, consideration and disposition by this court of petition for writ of certiorari to be made by petitioner herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before July 23, 1956.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner was, on October 29, 1952, the operator of the steamship *Fleetwood*. Respondent, John Williams, plaintiff below, was a longshoreman in the employ of an independent stevedore company, and was injured when he fell into the hold of that vessel under circumstances set forth in the "Statement" below. In a suit to recover damages arising out of those injuries the court below entered a judgment on a jury verdict in favor of respondent and the United States Court of Appeals for the Ninth Circuit affirmed.

The questions presented for review by this court are the following:

1. Is a ship operator liable because of unseaworthiness of the vessel, or for negligent failure to furnish a safe place to work, to a longshoreman in the employ of an independent stevedore company working on its vessel, who is injured as the result of a transitory condition created by the failure of the longshoremen, including the injured longshoreman, to make proper or full use of adequate lighting equipment

during the course of loading cargo on the vessel when the ship operator has no knowledge of the existance of such condition and such condition has not existed for a length of time which would warrant the inference that the ship operator ought to have known of it, i.e., had constructive knowledge?

2. Is a ship operator liable, either because of unseaworthiness of its vessel, or because of a negligent failure to furnish a reasonably safe place to work to a longshoreman, in the employ of an independent stevedore company, working on its vessel who is injured as the result of inadequacy of illumination where the ship operator furnished the longshoremen with an adequate number of suitable lights and the electric power to operate them?

3. Is a ship operator liable, either because of unseaworthiness of its vessel, or for a negligent failure to furnish a reasonably safe place to work, to a longshoreman in the employ of an independent stevedore company, working on its vessel who is injured as the result of the failure of an appliance to be put in operation in an area where, and for a purpose for which, it was not intended to function; or, expressed more in terms of the facts of this case, can liability of a ship operator to a longshoreman be predicated on a failure to have ceiling lights on in the hold while the longshoreman was performing the task of removing insulating plugs on top of the refrigerated cargo hold of the vessel, when the ceiling lights were intended solely for the purpose of lighting the wings of the hold and of giving illumination to longshoremen stowing cargo there, and were used only for that purpose?

4. Is there sufficient evidence in this case to meet the rule that a plaintiff must introduce substantial evidence to prove

his case which has been defined by this Court in the case of *Edison Co. v. Labor Board*, 305 U.S. 197, 229 as follows:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequte to support a conclusion."

While this question is applicable in evaluating the evidence on all ultimate factual issues in this case depending upon the rulings made by this Court on other questions raised in this petition, it is particularly important and applicable in connection with the possible existence of causal connection between the alleged failure to have on ceiling lights in the hold of the vessel at the time of the accident and the alleged lack of illumination on the hatch coaming from which respondent fell. In the terms and circumstances of this feature of the case the question may be expressed as follows:

> Should a jury vedict be upheld which was founded to any extent on the inference that certain lights would afford illumination in the area involved where all of the evidence introduced was to the contrary?

STATEMENT

At approximately 1:15 of the morning of October 29, 1952, respondent John Williams (plaintiff below), while working on the *Fleetwood* as a longshoreman in the employ of West Coast Terminals, Inc., an independent stevedore company, fell through the forward open section of No. 5 hatch of that vessel into the lower hold and sustained personal injuries. Williams fell as he was about to descend the ladder commencing at about the top of the hatch coaming. On October 27, 1953, Williams filed suit in the United States District Court for the Northern District of California

against petitioner, Pacific Far East Line, Inc., the operator of the vessel, for damages resulting from those injuries. The complaint alleged negligent failure to provide plaintiff with a safe place to work specifying certain particulars including inadequacy of lighting in and about the hatches. The same faults were alleged as factors creating unseaworthiness, except that the alleged lack of sufficient light is not claimed to be a factor causing an unseaworthy condition. Plaintiff's second amended complaint for damages is reproduced in the appendix.

Jurisdiction of the District Court was based upon diversity of citizenship under 28 U.S.C. 1332.

At trial no evidence was introduced as to any of the particular faults set out except as to alleged lack of sufficient light. Although not specified as a fault causing an unsafe condition evidence was introduced designed to show a slippery condition of the steps of the ladder on the face of the coaming, claimed to have been created by frost which plaintiff sought to prove was caused by cold from the refrigerated hold when one plug was removed.

On November 17, 1954, a jury verdict of $35,500 was rendered. Thereafter petitioner moved for a judgment notwithstanding the verdict or in the alternative for a new trial. Both motions were denied, the latter motion on the express condition that Williams remit in writing all damages above the sum of $28,000. Such damages were remitted in writing and on December 10, 1954, judgment was entered in favor of plaintiff in the amount of $28,000. The Court of Appeals for the Ninth Circuit affirmed this judgment.

A description of the area in which this accident occurred is important to an understanding of the facts of this case. The *Fleetwood* is a refrigerator or "reefer" type vessel of modified C-2 design. It has five cargo hatches of which the

aftermost is numbered 5 and is the one here involved. Immediately forward of No. 5 hatch is a platform about 20 inches above the main deck on which are mounted two winches. This winch platform is separated from the hatch opening by a coaming, the upper edge of which is 8¾ inches above the winch platform. A guard rail 3 feet 8½ inches high is mounted on the winch platform and runs athwartships entirely across the winch platform parallel to and a few inches forward of the hatch coaming. The winch controls are located amidships on the winch platform immediately behind the guard rail in such a position that the operator, or winch driver, can look over the rail and observe activities in the hatch below without danger of falling in.

The square of No. 5 hatch is about 20 feet by 30 feet. However, only the forward section (⅓ of the hatch) was being used on the night in question. This forward section contains the following covers, in the order in which they must be removed to open that end of the hatch for working cargo: (1) a canvas cover which is rolled back by hand; (2) a steel pontoon covering the entire forward section of the hatch which is lifted out by use of the winch and laid on deck to one side and (3) five hatch "plugs" each of which is 9 feet 6 inches long, 4 feet wide and 15 inches thick. These plugs when in position lie side by side across the forward section of the hatch, and are removed one at a time, commencing with the center or "key" plug, by use of the winch. They constitute the insulation at the top required for the refrigerated compartment and make a solid level surface about 2 feet 9 inches below the upper edge of the coaming surrounding the hatch. The top of the coaming is about 2 feet 4 inches above the main deck on each side of the hatch. Recessed in the face of the coaming at the forward end of the hatch and approximately amidships, are hand

and foot holds which constitute the upper steps of the ladder leading down into the hold. Access to the hold is, of course, possible only when the center or key plug has been removed.

Williams and the other men in his gang who gave testimony were experienced in working on refrigerator ships. The gang arrived on the vessel for the night shift and commenced preparation for loading frozen cargo into the No. 5 hatch at about 7:00 P.M. on the night of October 28, 1952. Prior to that time three cargo lights had been set out in the vicinity of the hatch by ship's personnel for the use of the longshore gang working that hatch. These cargo lights were large 300 watt, Mogul base lights with white oval reflectors. They were attached to 40 foot insulated cords and were plugged into sources of electricity at fixtures located nearby. These cargo lights were part of the regular ship's gear and were often used in the manner they were used in this case. They had been used by Williams' gang since commencement of the work; and, there is no evidence that they were not of the customary type, in good condition and entirely suitable for their proposed use.

The plugs were removed without incident shortly after the men came to work. From that time until midnight, cargo was loaded into the hold. Light in the area of the square of the hatch for this operation was furnished by the three cargo lights which were placed by the longshoremen according to their own ideas. Two lights were lowered down into the hold to light the square of the hatch in the lower hold where the men were working and the third was hung just inside the coaming at the forward inshore square of the hatch to furnish light for lowering drafts of cargo and removing empty slings. During the loading the temperature in the hold was about 10° to 12° Fahrenheit.

Because of this extreme cold the men working there, including Williams, relieved one another at one-half hour or one hour intervals. (There was a conflict of testimony on the precise interval.) In any event, Williams and his fellow workers descended into and climbed out of the hold several times during the five hours prior to midnight.

At midnight the men working in the hold ascended to the main deck for an hour recess and lunch. The cargo lights were drawn up out of the hold by the longshoremen and placed in the vicinity of the hatch. Apparently at least one light was placed on the winch platform, offshore side, so that it threw light across the top of the coaming and to some extent into the square of the hatch. The hatch plugs were then replaced in order to maintain the proper temperature.

Williams' gang returned to work at approximately 1:00 A.M. and, apparently by common understanding, Williams, together with another longshoreman, undertook the job of attaching the sling to the plugs. They proceeded into the square of the hatch and onto the tops of the plugs where they hooked the sling on the key plug. That plug was lifted out by the winch driver and swung to a position on deck near the ship's inshore rail where two other longshoremen unhooked it.

After the key plug, which is necessarily the first one taken out, had been hooked on to the sling, Williams, according to his testimony, climbed out of the hatch, using that part of the ladder above the level of the plugs, and moved along the top of the coaming to the offshore side of the hatch. His partner merely stepped to the offshore plugs, two of which were still in place. After the key plug had been lifted up out of the way, Williams came back along the coaming and was about to descend the ladder, apparently intending to return to the plug level to continue his work

of hooking on, when he slipped and fell. In the language of the Court of Appeals, he "stepped back and down with one foot, seeking to step onto a bar fixed within a recess in the coaming above the space where the plug had been. He slipped, fell through the opening in the hatch left by the removal of the key plug, and landed on cargo stowed in the lower hold * * *."

Neither Williams nor anyone else testified that his foot had reached the first bar in the face of the coaming when he slipped. The only two witnesses interrogated on that point, the winch driver and one of the men who had unhooked the plug after it had been landed on deck, testified that they heard someone "holler" and, upon looking, saw an object going through the opening left by the removal of the key plug. It was later learned that the object was Williams. Neither did any witness see Williams climb out before he fell, although the ladder was directly in front of but below the winch driver, or at any other time before the "object" was seen falling. It was the contention of respondent (plaintiff below) that frost or ice had formed on the first step of the ladder in the coaming of the hatch—this by inference. There was no direct testimony that such was the fact. This step was 2′ 9¼″ above the top of the "freeze" hold. It was also contended that because of inadequate light he was prevented from seeing the frost and slipped and fell as a consequence. The evidence is not clear as to exactly where the three cargo lights were located on deck during the midnight lunch hour or where they were at the time Williams fell. But, at least one of them was on the winch platform and apparently on its side so that it cast some light in the square of the hatch. There was uncontradicted testimony that it was the practice of the longshoremen to use the cargo lights as they saw fit; and, that they

could have been, and generally are, hung by the longshoremen from the offshore side of the guard rail running along the forward end of the hatch, or placed on the nearby pontoon at the after end of the forward section of the hatch, or held by hand by another longshoreman and directed into the square of the hatch to furnish light for those hooking onto the plugs. This practice was consistent with the practice of the longshoremen to arrange the booms and cargo gear as they deemed necessary. One or more of these lights could have been used to cast bright light onto the tops of the plugs, an area about 20 feet athwartships and 9 feet 6 inches fore and aft.

Respondent introduced testimony at the trial designed to show that lights in the wings of the hold were not on, that they were supposed to be on and contended that had they been on some light would have gone up through the opening left by removal of the key plug and furnished some light for Williams' use in descending the ladder. The lights in question were 60 watt lights enclosed in cylindrical metal fixtures affixed to the ceiling, or overhead of the hold, and set back several feet from the square of the hatch. The evidence was uncontradicted that they were designed, and used solely, to furnish light in the hold for the men stowing cargo there. They had at the bottom of the cylinder heavy amber colored glass and because of the cylindrical fixtures in which they were set light was directed only downward where, in stowing, light was needed. They were about 10 feet apart and consequently only one on each side of the square of the hatch was approximately opposite the section in use. No evidence was introduced that these lights were intended to or would illuminate the hatch coaming from which Williams fell. The only witness questioned as to whether these lights would cast any light on the hatch coaming testified that no dis-

cernible light was cast. This testimony was based on actual observation during the running of a test.

There is no evidence that petitioner had knowledge of any insufficiency of illumination at the place where Williams fell or that such lack of illumination had existed such length of time that petitioner ought to have acquired knowledge. The evidence is uncontradicted that Williams fell within two or three minutes after he and the other men returned to work; but any illumination from the ceiling lights in the hold could not have become a factor until the key plug had been removed, and any dangerous condition could not have arisen until ice formed, if, indeed, it did. The elapsed time between removal of the plug and the accident was probably not more than 60 seconds. So the period of danger, if any, caused by lack of any illumination and presence of frost was extremely short.

As to the existence of any ice or frost on the coaming at the place from which Williams fell, the only direct evidence was offered by a witness who testified that immediately after Williams fell he observed frost or fog forming on the face of the coaming. No other witness testified on this point and Williams himself did not testify that he slipped on any such frost or ice. Petitioner presented a motion to the court asking that the jury be directed to disregard this testimony, but the motion was denied and the jury was permitted to infer that Williams slipped on the "frost or fog" observed in the general vicinity of where the falling object was seen by this witness subsequent to the fall. Another witness, who was able to qualify as an expert on refrigeration, testified to the effect that ice could be expected to form on the hatch coaming of a refrigerated compartment above the level of the tops of the plugs after the key plug was removed. This witness did not give any opinion as to pre-

cisely how long it would take ice to form after removal of the key plug at point of contact of the two airs or as to how high above the level of the reefer compartment, which was the bottom of the plugs, frost would form, or how soon—particularly at the place where Williams testified he slipped.

There is no evidence whatsoever that petitioner had any knowledge, actual or constructive, of the presence of any frost, if there was any, at the place from which Williams fell.

The elapsed time between the removal of the plug and Williams' fall was probably not more than 60 seconds, but certainly much less than two minutes. The only testimony bearing on this was that the whole job of removing the 5 plugs would take from 5 to 8 minutes, or from one minute to one minute and 36 seconds to a plug. But that part of the job involved in hooking on and getting out of the way had been done, and the sling had not yet been lowered for the next plug when Williams fell—it had been swung only part way back after the key plug was unhooked near the rail.

REASONS FOR GRANTING THE WRIT

1. First Question Presented for Review: The Scope and Applicability of the Rule Pertaining to Transitory Conditions.

The decision of the court below on this question is in error and is in conflict with decisions of other courts of appeals on the same question.

As the statement of facts herein shows the conditions which were alleged to have been unsafe existed for not more than a minute and a half and were created by the longshoremen, one of whom most directly concerned was Williams.

Petitioner contended in both courts below with respect to the alleged presence of frost and any insufficiency of illumi-

nation at the place from which respondent fell, that these conditions, if they existed at all, were transitory conditions of an otherwise sound portion or appurtenance of the vessel; and that therefore they could not constitute a ground for liability based on unseaworthiness, nor because of any failure to furnish a safe place to work, since petitioner had no knowledge of the existence of the conditions, nor had they existed such length of time as to charge petitioner with such knowledge.

Petitioner's position as to negligence has long been recognized as applicable to the duty owed by a property owner to an employee or business invitee.[1] Petitioner's position as to unseaworthiness is now well established by the decision of the Court of Appeals for the Third Circuit in *Cookingham v. United States*, 184 Fed. 2d 213, 1950 A.M.C. 1793, *cert. denied*, 340 U.S. 935 (1950) and other decisions of that court,[2] the Court of Appeals for the Second Circuit,[3] and numerous District Court and State Court cases.[4]

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1. *Brabazon v. Belships Co.*, 202 F.2d 904 (3d Cir. 1953), 1953 A.M.C. 737; *Guerrini v. United States*, 167 F.2d 352 (2d Cir. 1948).

2. *Adamowski v. Gulf Oil Corporation*, 197 F.2d 523 (3d Cir. 1952), 1952 A.M.C. 1221, affirming 93 F. Supp. 115 (E.D. Pa. 1950), 1950 A.M.C. 2079, *cert. denied* 343 U.S. 906 (1952); *Shannon v. Union Barge Line Corp.*, 194 F.2d 584 (3 Cir. 1952), 1952 A.M.C. 686, *cert. denied* 344 U.S. 846 (1952).

See also *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3d Cir. 1953); *Brabazon v. Belships Co.*, 202 F.2d 904 (3d Cir. 1953), 1953 A.M.C. 737.

3. *Boyce v. Seas Shipping Co.*, 152 F.2d 658 (2d Cir. 1945), 1946 A.M.C. 45; *Poignant v. United States*, 225 F.2d 595 (2d Cir. 1955); *Grillea v. United States*, 232 F.2d 919 (2d Cir. 1956) *semble*.

4. *Daniels v. Pacific-Atlantic S.S. Co.*, 120 F. Supp. 96 (E.D. N.Y. 1954), 1954 A.M.C. 806; *Hawn v. Pope & Talbot, Inc.*, 99 F. Supp. 226 (E.D. Pa. 1951), 1951 A.M.C. 1604, *modified on other grounds* 198 F.2d 800 (3rd Cir. 1952), 1952 A.M.C. 1708, *as modified, aff'd* 346 U.S. 406 (1953), 1954 A.M.C. 1; *Holliday v. Pacific-Atlantic S.S. Co.*, 99 F. Supp. 173 (D. Del. 1951), *rev'd on other grounds*, 197 F.2d 610 (3d Cir. 1952), *cert. denied* 345 U.S. 922

The decision of the court below is inconsistent in substance, with the decision in *Cookingham v. United States, supra,* and the cases following it, including the other Court of Appeals, District Court and State Court cases cited above. While in terms merely describing the *Cookingham* case as "doubtful" authority in the Ninth Circuit, the court below actually reached a conclusion on the issue of lighting in direct conflict with that case and the cases following it. The pertinent language of the court below is as follows:

> "Here, however, as already seen, there was evidence of a condition, *attributable to the ship,* of insufficient lighting which might well be thought to have been responsible for appellee's mishap. *Even though the condition of inadequate lighting be regarded as 'transitory', that fact would obviously not serve to absolve appellant of liability.*" (Emphasis added.)

There can be no distinction between the transitory character of the insufficient illumination in our case and that of the jello on the stairs in the *Cookingham* case, *supra,* or any of the numerous other judicially recognized transitory conditions. In fact the instant case is much stronger on the facts. That illumination is a proper subject for the application of the transitory conditions rule was clearly held by the Court of Appeals for the Third Circuit in *Adamowski v. Gulf Oil Corporation.*[5]

(1953); *Stolper v. U.S.A.* (E.D. Pa. 1950), 1950 A.M.C. 551; *McMahan v. The Panamolga,* 127 F. Supp. 659 (D. Md. 1955); *Pietryzk v. Dollar Steamship Lines,* 31 Cal. App. 2d 584, 88 P.2d 783 (1939), 1939 A.M.C. 1281; *Gladstone v. Matson Navigation Co.,* 124 Cal. App. 2d 493, 269 P.2d 132 (1954), 1954 A.M.C. 1004; *Blodow v. Pan Pacific Fisheries, Inc.,* 128 Cal. App. 2d 428, 275 P.2d 795 (1954).

5. *Supra* note 2.
See also *Hawn v. Pope & Talbot, Inc., supra* note 4; *Crawford v. Pope & Talbot, Inc., supra* note 2.

The court below may have been attempting to distinguish the rule of the *Cookingham* case as to the lighting on the theory that its inadequacy was thought to be "attributable to the ship." This last quoted phrase has no clear meaning. If it is intended to mean the equivalent of *caused by the vessel or by her officers or crew*, the statement has no foundation in fact and is in any event inconsistent with the basis for the transitory condition rule. In a number of the cases applying the rule it is clear from the evidence that the transitory condition must have been caused by the vessel or her personnel; but this point was not allowed to affect the holdings.[6] It is petitioner's position that seaworthiness, or the lack of it, depends solely on the nature of the condition, to wit: was it transitory, not the identity of the persons causing it.

It is petitioner's position that *Cookingham v. United States*, supra, and the other cases involving transitory conditions cited above, was correctly decided in accordance with recognized principles of the law of negligence and the historic maritime doctrine of unseaworthiness which was made applicable to longshoremen by *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). Seaworthiness has never been synonymous with safety and the doctrine is properly applied only to unsound, worn out or other inherently defective conditions of vessel or appliances. If a condition is merely transitory, it is not an unseaworthiness, although it may be a basis for liability for negligent failure to furnish a safe place to work where, but *only* where, there has been a negligent failure to correct the condition after it has become known or ought to have become known, in accordance with

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6. *Adamowski v. Gulf Oil Corporation*, *supra* note 2; *Holliday v. Pacific-Atlantic S.S. Co.*, *supra* note 4; *Stopler v. U.S.A.*, *supra* note 4; *Daniels v. Pacific-Atlantic S.S. Co.*, *supra* note 4; *Blodow v. Pan Pacific Fisheries, Inc.*, *supra* note 4.

the universally accepted principles of the law of negligence applicable to employees and business invitees.[7]

The holding of the court below on this issue conflicts in principle with a decision of this court.

In *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1954) this Court held that, while the doctrine of seaworthiness applies as well to the crew as to the ship, nevertheless "it does not mean that the owner is liable every time a seaman gets drunk and does damage to a member of the crew" (348 U.S. 336, 339); rather, unseaworthiness in respect of the crew requires "a seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature" (348 U.S. 336, 340). This language can only be construed to mean that a vessel is not unseaworthy because a seaman of average disposition becomes dangerous because of intoxication or some other reason and assaults another seaman. This is a transitory condition.

This Court drew an analogy between a seaman of vicious nature and traditional unseaworthiness of a non-transitory character such as a rope with a weak strand or a hull with a latent defect. By the same token a temporarily drunk or angry seaman, while for the moment as dangerous as one with a vicious nature, does not make a vessel unseaworthy because this unsafe condition is a transitory one. This analysis was made by Judge Hincks in *Poignant v. United States*, 225 Fed. 2d 595 (2d Cir. 1955), as follows (p. 598):

> "We think the import of the *Boudoin* case is that just as the vessel is not unseaworthy because of the misbehavior of a seaman whose disposition and skill is the equal of that of ordinary men in the calling, so it does not become unseaworthy by reason of a temporary

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7. See generally on the status of a longshoreman as a business invitee:

McFall v. Compagnie Maritime Belge, 304 N.Y. 314 (1952) 107 N.E. 2d 463; 1952 A.M.C. 1860.

condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service."

In treating a transitory condition, i.e., any momentary insufficiency of light as an unseaworthiness the court below held contrary to the holding of this court in the *Boudoin* case, supra. It may be pointed out also that any insufficiency of light could create a perilous situation only because of frost, which was also momentary.

The question of the application of the transitory condition rule to the doctrine of seaworthiness is of vital importance in federal maritime law and should be settled by this Court.

Not less than 16 reported cases in the Courts of Appeals, United States District Courts and State Courts have applied the rule in varying factual circumstances[8] and a leading text has approved it.[9] Only the opinion in the court below has been found which appears to repudiate it. There has, however, not always been agreement as to its meaning and manner of application and considerable confusion has resulted.[10]

It is petitioner's position that the rule applied to the

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8. See cases cited in notes 1, 2, 3 and 4, *supra*.

9. 2 *Norris, The Law of Seamen*, Sec. 615A (1955 Cum. Supp.).

10. Thus in *Shannon v. Union Barge Line Corp., supra*, there is a suggestion that the rule should be applied only where there is evidence that someone other than vessel personnel could have caused the transitory condition; and in *Poignant v. United States, supra*, there is a hint that the transitory condition rule is merely an application of the principle that seaworthiness means only *reasonable* fitness. Also in *Grillea v. United States, supra*, it was apparently held that the length of time an unsafe condition consisting of an improperly placed hatch cover could exist in order to be deemed an unseaworthiness is to be judged in the light of whether the article is thought to have been put permanently in place.

transitory conditions is a necessary and integral part of the doctrine of unseaworthiness for the reason that, without it, that doctrine would render the shipowner the insurer of virtually all injuries on his vessel from whatsoever cause. That the doctrine of seaworthiness is not intended to render the vessel owner such an insurer has been stated on many occasions.[11] Yet, if unseaworthiness is to be found in every case where there is even a temporarily unsafe condition the shipowner would be found liable in virtually every case of a fortuitous circumstance causing injury. For example, were lightning to strike the ship and start a fire or knock a mast to the deck, the vessel would at that moment be unseaworthy, though the unsafe condition would be transitory. Likewise, if a fellow stevedore negligently handled the ship's gear and dislodged a strongback causing it to fall into the hold and injure a workman, the vessel would be unseaworthy for at least the momentary period between the dislodging of the object and the causing of the injury to the man below. Furthermore, a workman or seaman proceeding to his place of work at night would have to be preceded by a mate to make sure that he turned on all lights as he went, or used his flashlight, since his failure to use the lights, although momentary, would render the area dark and unsafe and therefore unseaworthy. There is, in short, in virtually every case of physical injury some short period of time when there was an unsafe condition immediately preceding and at the time of the accident.[12] It can hardly be argued that a vessel with a temporarily drunk

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11. *Freitas v. Pacific-Atlantic Steamship Company*, 218 F.2d 562 (9th Cir. 1955), 1955 A.M.C. 649; *Lake v. Standard Fruit & Steamship Co.*, 185 F.2d 354 (2d Cir. 1950), 1951 A.M.C. 71.

12. See the opinion of Judge Hand in *Grillea v. United States*, 232 F.2d 919 (2d Cir. 1956).

and belligerent seaman was not unsafe for the time being. Nevertheless, this court has held that such a situation is not one of unseaworthiness.

Furthermore, if the doctrine of unseaworthiness is to be deemed to include even transitory conditions, then the traditional right of the longshoreman, as a business invitee, to recover for negligent failure to furnish a safe place to work is included in the right to recover for unseaworthiness. Likewise in seamen's cases the right to recover in negligence would be rendered mere surplusage.

It is, therefore, respectfully submitted that because of the present uncertainty as to the scope and application of the rule which has been applied to transitory conditions the question should be settled by an opinion of this court. There can be no doubt that the question has now become a most important one in maritime law.

2. Second Question Presented for Review: Liability of the Ship Operator Who Has Furnished Adequate Equipment to Stevedore Engaged in Loading Vessel.

The decision below on this question was in error and is in conflict with decisions of other courts of appeals.

This question was not dealt with, expressly, by the court below in its written opinion although presented by the briefs and argued by counsel both there and in the trial court. Before both courts petitioner took the position that the furnishing by the ship operator of an adequate number of suitable lights and the electric power to operate them fulfilled the ship operator's duty to the longshoremen respecting illumination. As stated earlier in this petition, the evidence introduced at trial supports without substantial contradiction the application of this rule.

The rule was established as the law in the First Circuit in *O'Leary v. United States Line Company*, 215 Fed. 2d 708

(1st Cir. 1954) 1954 A.M.C. 1772. That court affirmed a judgment entered on a directed verdict for the defendant using the following language:

> "The hold was dangerous only because it was dark, and certainly there was nothing hidden about that danger. Thus any finding of the defendant's negligence must be predicated on a duty to light. But, under the arrangement with the master stevedore, and in accordance with the practice generally followed, the ship's duty was only to provide an adequate number of suitable lights, and the electric power to operate them (and, perhaps, to connect them), while it was the master stevedore's duty to request such lights as he thought were required and to place them where he thought they were needed. On the evidence it could not be found that the shipowner failed in the performance of its duty. That is to say, there is no evidence that suitable lights were not available on the ship in adequate quantity, or that the lights supplied were defective, or that current was not continuously available to operate them."

Likewise the rule was recognized by the Third Circuit in *Brabazon v. Belships Co.*, 202 Fed. 2d 904 (3rd Cir. 1953), 1953 A.M.C. 737, where, however, the court found that there was evidence that the ship was requested to supply additional lights from time to time prior to the accident but had failed to do so. The rule has also been applied by the Court of Appeals for the Second Circuit[13] and in a State Court[14] and District Court[15] decisions.

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13. *Long v. Silver Line*, 48 F.2d 15 (2d Cir. 1931), 1931 A.M.C. 991.

14. *Riley, Admx. v. Agwilines, Inc.*, 290 N.Y. 402, 73 N.E. 2d 718 (1947), 1947 A.M.C. 1038.

15. *Goldberg v. United States*, 91 F. Supp. 104 (E.D.N.Y. 1950), 1950 A.M.C. 1226; *The Hindustan*, 37 F.2d 932 (E.D.N.Y. 1930), 1930 A.M.C. 304 *aff'd. per curiam* 44 F.2d 1015 (2d Cir. 1930) 1931 A.M.C. 270.

In failing to recognize the rule contended for by petitioner the court below acted contrary to these decisions of the Courts of Appeals for the First, Second and Third Circuits.

The state of the law in the Second Circuit, despite the decision of *Long v. Siver Line, supra,* (note 13), has been placed in a state of confusion by the very recent decision of that Court in *Grillea v. United States*, 232 Fed. 2d 919 (2d Cir. 1956). It was there held that the shipowner was liable to a longshoreman on the theory of unseaworthiness with respect to hatch covers when proper hatch covers were furnished the longshoremen but they had been improperly placed. This condition lasted for only a comparatively short period of time (the precise time does not appear); but the court stated that on the facts the misplaced cover had "* * * become as much a part of the tween deck for continued prosecution of the work, as though it had been permanently fixed in place." Judge Swan dissented on the ground that injuries caused by improper use of proper gear by a stevedore is not a basis for liability because unseaworthiness is *not* created.[16]

The decision of the court below is also in conflict with decisions of courts of appeals of other circuits holding generally that where the ship operator has furnished adequate equipment and devices for the safety of seamen it has discharged its duty to furnish a seaworthy vessel, and indeed a safe place to work, even though the seamen fail to utilize such devices and equipment. This was the holding in *Shields v. United States*, 175 Fed. 2d 743 (3rd Cir. 1949) 1949

16. Compare *Freitas v. Pacific-Atlantic Steamship Company*, 218 F.2d 562 (9th Cir. 1955), 1955 A.M.C. 649, and *Berti v. Compagnie De Navigation Cyprien Fabre*, 213 F.2d 397 (2d Cir. 1954).

A.M.C. 1355, *cert. denied* 338 U.S. 899 (1949) and *Nelson v. United Fruit Co.*, 201 Fed. 2d 47 (2nd Cir. 1952), 1953 A.M.C. 146.[17]

The question is one of great importance in federal maritime law which has not been, but should be, settled by this court.

The entire working relationship between ship's officers and stevedores, and consequently the basic stevedoring policies of both steamship operators and stevedore companies, depends upon the resolution of this basic question. The almost universal modern practice of the industry is to hire independent stevedore companies to perform the work of loading and discharging cargo. Tools, equipment and facilities are turned over to the stevedore company who is relied upon to perform the work in a proper and workmanlike manner. Because of this arrangement stevedore companies employ their own workmen and supervisory personnel, including gang bosses in charge of each gang, and walking bosses in charge of the handling of cargo on an entire vessel. These men are in actual working control of the work being done. In the safety rules established and published jointly by shipowners, operators, stevedore companies and the longshoremen's unions these various bosses and other longshoremen are given precise responsibilities for safe working methods.

This being the established and agreed-upon state of affairs in the maritime industry, steamship operators do not exercise direct supervision over the work of the longshoremen. At the vessel level this means that mates and other ship's personnel are not charged by their employers with

17. To the same effect are *Larsson v. Coastwise* (Pacific Far East) *Line*, 181 F.2d 6 (9 Cir. 1950), 1950 A.M.C. 769, *cert. denied* 340 U.S. 833 (1950), and *Lieflander v. State Steamship Co.*, 149 Ore. 605, 42 P.2d 156 (1935), 1935 A.M.C. 559.

the duty of exercising such supervision, and in actual practice they do not do so. Indeed, at night all vessel personnel, except a night mate, night engineer and sometimes other maintenance men, are generally permitted to go ashore.

Plainly, if ship operators are to be held liable for the manner in which the stevedores and individual longshoremen utilize the equipment furnished them and otherwise perform their work, as well as for the sufficiency of the equipment furnished, substantial changes will have to be made in operating arrangements and procedures throughout the industry so that the actual responsibility of the parties and their employees will coincide with their legal responsibilities and potential liabilities.

These important industry-wide business and operating considerations, together with the considerable amount of litigation which has resulted in difficult and conflicting decisions of lower courts require that this court now undertake to review and resolve this question.

3. Third Question Presented for Review: Failure of Appliance to Be Operated for Purpose Not Intended or Customary Does Not Constitute Unseaworthiness.

The decision below on this question is in error and is in conflict with a decision of other courts of appeals and with decision of this court.

In the court below reliance was apparently placed on testimony that certain hold lights were not turned on. In the words of the opinion written by Judge Healy:

> "There was testimony that the small lights attached to the tween deck overhead, for illuminating the tween deck hold, were not turned on at this time. These lights are under the control of the ship's officers and are supposed to be on at all times; and the jury might well have inferred that had they been on they would have cast sufficient illumination on the hatch coaming to help

substantially in revealing to appellee the slippery condition of the surface on which he was about to step."

Petitioner pointed out in the court below and in the trial court that these lights were not designed or intended or used to light the hatch coaming or the upper surface of the plugs but rather were to afford illumination to men engaged in the work of stowing cargo in the wings of cargo compartment in which longshoremen were working. At the trial four witnesses, viz., the chief mate, the night mate (an old time ship's master), the chief engineer and the longshore gang boss testified that these lights were intended for the latter purpose and were used for that purpose only. No witness testified that these lights were intended or designed or were used to light the hatch coaming or plugs or to furnish illumination for the task of removing the plugs. Indeed, as will be emphasized later, no witness even testified they could cast any light in the area in which respondent was working at the time he fell.

In *Holub v. Sword S.S. Line*, 132 Fed. 2d 206 (5th Cir. 1942) 1943 A.M.C. 898, it was held that a cargo batten on which libelant was climbing was not unseaworthy when the rusty cleat holding it in place broke, since cargo battens were not intended to be used for climbing upon. Likewise, an earlier case in the Ninth Circuit held that a beam across a hatch from which a seaman had fallen was not unseaworthy in not furnishing a safe footing since the beam was not intended as a place to work.[18]

The court below, in failing to apply the proper definition of unseaworthiness to this case, acted in conflict with the decision of the Court of Appeals of the Fifth Circuit in

18. *Hunt v. Hobbs, Wall & Co.*, 42 F.2d 437 (9th Cir. 1930), 1930 A.M.C. 1390.
See also *The Queen Elizabeth*, 209 Fed. 712 (N.D. Cal. 1913).

Holub v. Sword Line, supra, as well as its own earlier decision.

Seaworthiness has always been held to mean adequate for the purpose intended and ordinarily used. This is the concept adopted by this court in *The Oseola*, 189 U.S. 158 (1903) and *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1943). Consequently the holding of the court below, that the vessel was unseaworthy when an appliance was not operating for a purpose for which never intended or customarily used, is contrary to the concept of seaworthiness adopted by this court.

4. Fourth Question Presented for Review: Sufficiency of the Evidence Adduced by Plaintiff on Essential Issues in the Case.

As indicated in the preceding portion of this petition, the court below appeared to rely in large part, in affirming the judgment of the trial court, on the fact that there was testimony in the case that certain ceiling lights in the hold were not on at the time respondent fell and that the jury could infer that, if on, they would have thrown substantial light on the place from which Williams fell. Petitioner urged in the trial court and the court below that no evidence was introduced that the ceiling lights in question would have cast any illumination whatsoever on the place from which respondent fell even if they had been on at the time. The only evidence introduced on this question at all was testimony of a witness who had made observations with the lights both on and off and noted that when on the lights did not cast any light or illumination on the place from which respondent fell. The court below, however, stated that the jury "might well have inferred that had they been on they would have cast sufficient illumination on the hatch coaming to help substantially in revealing to appellee the slippery condition of the surface on which he was about to step."

The decision of the court below on this point is in error and is in direct conflict with applicable decisions of this court and decisions of other Courts of Appeals on the same matter.

In *Penna. R. Co. v. Chamberlain*, 288 U.S. 333 (1933) this court established the applicable rule to be as follows (p. 340):

> "[R]espondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

Under this rule it is clear that an inference of the jury that these hold lights, had they been on, would have cast sufficient illumination to have revealed the condition of the surface in question to respondent, or substantial aid, is not permissible in the face of the positive testimony of an unimpeached witness that turning on the lights in the hold does not result in any increased illumination at the point in question. As this court pointed out in the *Chamberlain* case, the fact sought to be inferred was not only essential to plaintiff's case but one on which he had the burden of proof, requiring more than a "scintilla" of evidence. Such an inference under such circumstances cannot meet that minimum requirement.

This rule has been specifically and recently applied by the Courts of Appeals of at least the Fifth, Sixth, Seventh and Eighth Circuits.[19]

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19. *Kuykendall v. United Gas Pipeline Co.*, 208 F.2d 921 (5th Cir. 1953); *Commercial Standard Ins. Co. v. Gordon's Transports*, 154 F.2d 390 (6th Cir. 1946); *Sickles v. Graybar Electric Company*, 219 F.2d 847 (7th Cir. 1955); *Barnett v. Terminal Railroad Association of St. Louis*, 228 F.2d 756 (8th Cir. 1956).

The evidence adduced by plaintiff failed to meet the minimum requirements of this court in respect to another important factual element of this case, viz., no substantial evidence was introduced that any frost was present at the point at which Williams slipped.

The point at which Williams slipped had to be first established, and the evidence introduced at trial shows without contradiction that plaintiff slipped when he had one foot on the hatch coaming and was stepping down with the other foot to descend the ladder. The court below recognized this fact where, in describing the accident, they stated that "He stepped back and down seeking to step onto a bar affixed within a recess in the coaming."

There is no substantial evidence in the record establishing the presence of any frost or moisture at that point; in fact none at all at the critical area. The only testimony on the point is to the effect that there was frost or moisture forming on the forward facing of the hatch coaming in the general vicinity of where a body was seen falling.

A witness who was able to qualify as an expert on the subject of refrigeration was called by plaintiff and testified in effect that the removal of a hatch plug from a compartment having a temperature of 10° to 12° Fahrenheit would cause frost to form on the hatch coaming area above the plug. He did not testify that such frost would form on the top of the hatch coaming from which Williams slipped or on the first rung of the ladder, below the top of the coaming where respondent in his brief contended he slipped. Furthermore, his testimony was patently in error because of the obvious fact that moisture from the air will condense on a surface only when the temperature of the surface is below the dew point of the air and will freeze thereon only when the temperature of the surface is below freezing. Obviously

the temperature of the hatch coaming, being in the outer air, was higher than the temperature of the air in the hold which was 10° to 12° Fahrenheit; consequently it could not have a temperature lower than the dew point of the air nor could it have a temperature below freezing.

In any event any inference that the jury might have sought to draw that frost or moisture had formed on the hatch coaming was an inference contrary to the only unimpeached direct evidence on the point in the record. The witness who testified on this point was an engineer who had measured the temperature of the hatch coaming immediately adjacent to the lowest recessed step above the level of the plugs under conditions substantially identical to those existing on the night of Williams' accident and had found that the temperatures at that point varied between 48° and 44½° Fahrenheit. An unsupported inference contrary to this testimony cannot be permitted to stand and is not sufficient to constitute the substantial evidence required by this court to sustain a judgment. In ruling to the contrary the court below acted contrary to the decision of this court in *Penna. R. Co. v. Chamberlain*, supra.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari herein prayed for should be granted.

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Of Counsel

(Appendix Follows)

Appendix

OPINION OF THE COURT BELOW

United States Court of Appeals
for the Ninth Circuit

No. 14,706—May 23, 1956

Pacific Far East Lines, Inc., a Corporation,
Appellant,

vs.

John Williams,
Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division

Before: Healy, Lemmon and Fee, Circuit Judges
Healy, Circuit Judge

This is an appeal from a judgment for appellee, a longshoreman, in a suit for damages for personal injury predicated on negligence of appellant and on unseaworthiness of its refrigerator ship Fleetwood. The case was tried to a jury, which returned a general verdict for appellee.

The longshore gang which was engaged in loading the Fleetwood had knocked off work at midnight for lunch. Before leaving they closed up the No. 5 hatch with heavy insu-

lation plugs to keep the hold from heating while away. About 1 A.M. they returned to resume loading. In order to remove the insulation plugs appellee and another longshoreman climbed down onto the plugs and hooked the key plug to a wire sling connected with the cargo winch. The two men then got out of the way, appellee by leaving the hatch. The winch lifted the plug and carried it over to the inshore deck where it was deposited. Appellee then started to climb over the coaming to hook up the next plug. He stepped back and down with one foot, seeking to step onto a bar affixed within a recess in the coaming above the space where the plug had been. He slipped, fell through the opening in the hatch left by the removal of the key plug, and landed on cargo stowed in the lower hold, suffering serious injury.

There was testimony that moisture and frost had formed on the hatch coaming and its recessed steps, from which the jury were entitled to infer that appellee's plunge into the hold was precipitated by his slipping on this treacherous surface. The evidence for appellee tended strongly to show that the lighting above the plugs was insufficient to disclose the existence of the hazardous condition described. This evidence we summarize briefly.

A large canvas known as a "Seattle tent" was suspended above the hatch to keep warm air from raising the temperature in the hold. Some light from a floodlight attached to the mast penetrated a narrow slit in this canvas. Also there was some light which emanated from cargo lights resting on the deck or propped against the hatch coaming, and some which came from the dock lights. There was testimony that the small lights attached to the 'tween deck overhead, for illuminating the 'tween deck hold, were not turned on at this time. These lights are under the control of the ship's officers and are supposed to be on at all times; and the jury might

well have inferred that had they been on they would have cast sufficient illumination on the hatch coaming to help substantially in revealing to appellee the slippery condition of the surface on which he was about to step.

In this state of the proof on appellee's behalf the jury were not unwarranted in finding unseaworthiness or negligence, or both, on the part of the shipowner. The instructions given them by the court were thorough and informative, and there appears to be no good reason why we should disturb their verdict.

Appellant, citing Cookingham v. United States, 3 Cir., 184 F.2d 213, argues that the presence of ice in the area or the slippery condition of the coaming was a "transitory" condition, not constituting unseaworthiness or negligence on the part of the ship. Assuming the doubtful proposition that the *Cookingham* holding is recognized in this circuit as persuasive authority, we see no analogy between it and the case before us. In *Cookingham* the injured seaman, a cook, slipped on some "jello" while going down a stairway. There was no evidence tending to connect the ship with the presence of the jello on the stairway, and apparently none tending to show that the stairway was insufficiently lighted. Here, however, as already seen, there was evidence of a condition, *attributable to the ship*, of insufficient lighting which might well be thought to have been responsible for appellee's mishap. Even though the condition of inadequate lighting be regarded as "transitory", that fact would obviously not serve to absolve appellant of liability.

Affirmed.

(Endorsed:) Opinion. Filed May 23, 1956.

Paul P. O'Brien, Clerk.

COMPLAINT IN DISTRICT COURT

United States Court for the Northern District of California, Southern Division

No. 33146

John Williams,
Plaintiff,
vs.
Pacific Far East Lines, Inc., a Corporation,
Defendant.

Second Amended Complaint for Damages

Plaintiff John Williams complains of defendant that:

I.

This is an action of a stevedore under the applicable civil and maritime laws of the United States pertaining to actions by stevedores engaged in maritime pursuits. The action is brought upon the law side of this Honorable Court and demand for trial by jury is respectfully made.

II.

At all times relevant herein, defendant Pacific Far East Lines, Inc., was and is a corporation, incorporated, organized and existing under and by virtue of the laws of the State of California, and doing business in and under the laws of said state; that plaintiff John Williams is a citizen of the State of California, resident in the City and County of San Francisco, said State being within the jurisdiction of

this Honorable Court; that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand ($3,000.00) Dollars.

III.

At all times relevant herein, defendant Pacific Far East Lines, Inc., a corporation, did manage, control, operate and own that certain vessel the "S. S. Fleetwood" upon which vessel plaintiff herein was injured.

IV.

At all times herein relevant, plaintiff John Williams was a longshoreman employed by Pacific Maritime Association for West Coast Terminals which company agreed to and did furnish the defendant Pacific Far East Lines, Inc., with stevedores and longshoremen for the purpose of loading the said "S. S. Fleetwood" at Alameda Air Base, Oakland, California; that pursuant to the agreement aforesaid, plaintiff was aboard the said vessel on the 29th day of October, 1952, at the express invitation of defendants; and within the course and scope of his employment and in discharge of his duties.

V.

On the 29th day of October, 1952, at or about 1:15 a.m., plaintiff, while in the course of his employment and at the express invitation of defendants herein, as aforesaid, and while working as a hole man in hatch #3 and/or #4 or #5 of said vessel aforesaid, loading cold storage, was caused to and did fall in one of said open hatches, by reason of the negligence of the defendants and the unseaworthiness of said vessel at the aforesaid time, place and hour, sustaining permanent disabling injuries, consisting of the following:

1. Both wrists broken.
2. Fractured ribs, knee and ankle.

3. Loss of teeth.

4. Left eye affected.

5. Concussion.

6. Contusions, abrasion, lacerations and scarring in and about the body.

7. Excruciating pain, shock and suffering, and other injuries not presently diagnosed, the allegations of which plaintiff prays leave to insert by amendment when ascertained.

8. On information and belief, plaintiff alleges that by reason of and as a result of the breaking and fractures of his wrists, as aforesaid, he will never again be able to pursue his trade of longshoreman.

VI.

That at the times herein mentioned, defendant owed plaintiff the duty of providing a safe ship, place, in which to work; and defendant negligently failed to do so; that the aforesaid injuries, sustained by virtue of the incident hereinabove more fully set forth, were proximately caused by reason of the negligence of the defendant Pacific Far East Lines, Inc., its masters, officers, agents, servants and employees in the management, control and operation of the "S. S. Fleetwood" at the aforesaid time, place and hour, for reason that the said defendant negligently:

1. Failed to provide plaintiff with a safe and proper place to work while he was aboard said vessel.

2. Failed to provide plaintiff with competent and efficient supervisory employees of the defendant, then and there charged with the safety, control and management of said vessel.

3. Failed to warn plaintiff of the dangers to be encountered by virtue of the failure of defendant to erect and

maintain proper safeguards, guard lines, guard rails, guard chains and the like around the said number 3 and/or 4 or 5 hatches aboard said vessel.

4. Failed to erect and maintain proper safeguards, guard lines, guard chains, guard rails, and the like for the protection of persons lawfully aboard said vessel and within the course and scope of their employment in and about said number 3 and/or 4 or 5 hatches of said vessel.

5. Failed to provide safe and proper lighting in and about said number 3 and/or 4 or 5 hatches and in the areas adjacent thereto.

VII.

That prior hereto, and on the 26th day of October, 1953, plaintiff executed a "Notice of Election to Sue" and herein pursuing remedies against third parties, the defendants herein, pursuant to Section 33 of the Longshoremen and Harbor Workers Compensation Act.

VIII.

Solely by reason of the premises, plaintiff has required, and will in the future require the services of hospitals, physicians, surgeons, medical specialists, roentgenologists, nurses and the like to his damage in a presently unascertained amount, the allegations of which he prays leave to insert by amendment when ascertained.

IX.

At the time of the aforesaid injury, plaintiff was a healthy, vigorous family man and a competent stevedore aged about 45 years, capable of earning and earning approximately $400.00 per month, plus overtime; that solely by reason of the premises and as a proximate consequence thereof, plaintiff was unemployed to his damage in the sum of approximately $4,000.00 and plaintiff is informed and

believes, and therefore alleges that he will be unemployable in his present trade in the future, to his damage in a presently unascertained amount, the allegations of which he prays leave to insert by amendment when ascertained.

X.

Solely by reason of the premises, plaintiff has been generally damaged in the sum of $150,000.00.

Second Cause of Action of John Williams

As and for a Second distinct and separate cause of action, plaintiff complains of defendant that:

I.

Realleges, as if fully set forth, Paragraphs I, II, III, IV, V, VII, VIII, IX and X of his First Cause herein.

II.

That at the times herein mentioned, defendant owed plaintiff the duty of providing a seaworthy vessel in which to work and defendant failed to do so; that the aforesaid injuries, sustained by reason of the incident hereinabove more fully set forth, were proximately caused by reason of the negligence of the defendant Pacific Far East Lines, Inc., its masters, officers, agents and employees in maintaining said vessel, "S. S. Fleetwood" as an unseaworthy vessel, at the aforesaid time, place and hour; that said vessel was unseaworthy in that defendants:

1. Failed to provide plaintiff with a safe and proper place to work while he was aboard said vessel.

2. Failed to provide plaintiff with competent and efficient supervisory employees of the defendant, then and there charged with the safety, control and management of said vessel.

3. Failed to warn plaintiff of the dangers to be encountered by virtue of the failure of defendants to erect and maintain proper safeguards, guard lines, guard rails, guard chains and the like around said number three and/or four or five hatches aboard said vessel.

4. Failed to erect and maintain proper safeguards, guard lines, guard chains, guard rails and the like for the protection of persons lawfully aboard said vessel and within the course of their employment in and about said number three and/or four or five hatches of said vessel.

5. Failed to provide proper and safe approaches, areaways, egress and ingress to and from said number three and/or four or five hatches of said vessel.

Wherefore, Plaintiff John Williams prays damages against the defendants on his First and Second Causes of Action:

1. General Damages—$150,000.00.
2. Special Damages for past loss of earnings—$4,000.00.
3. Special damages for future loss of earnings, as may be alleged.
4. Special damages for present and future medical, hospital and doctors' bills, as may be alleged.
5. Costs of suit.
6. All further meet relief.

Melvin M. Belli, Sr.
E. Brawner Johnson,

By /s/ E. Brawner Johnson,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 29, 1954.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 268

PACIFIC FAR EAST LINE, INC., a corporation,
Petitioner,

vs.

JOHN WILLIAMS,
Respondent.

Answer to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

PACIFIC FAR EAST LINE, INC., a corporation,
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Respondent.

Answer to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

No opinion was filed in the United States District Court for the Northern District of California and consequently there are no reports.

The opinion of the Court of Appeals was filed May 23, 1956, and is unreported. A copy is reproduced in the appendix of the petition.

On June 20, 1956, an order was entered by the Court of Appeals staying issuance of mandate pending the filing, consideration and disposition by this court of petition for

writ of certiorari to be made by petitioner, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before July 23, 1956.

STATEMENT

The statement in the petition is inadequate, so it is necessary to set out the facts of this case here.

John Williams, a longshoreman, was employed by West Coast Terminals, a stevedoring company. The West Coast Terminals, by agreement with Pacific Far East Line, Inc., a corporation, furnished longshoremen to load the *S. S. Fleetwood,* a refrigerator ship. Among the longshoremen who went to work on the *S. S. Fleetwood* was the respondent.

Work was commenced by the night crew, of which John Williams was a member, at 7:00 P.M. The only equipment provided by Pacific Far East Line, Inc. for carrying on this work was supplied prior to the commencement of work at 7:00. During the time between 7:00 and the occurrence of the injury to John Williams the ship and this equipment was at all times under the general control and supervision of Pacific Far East Line, Inc. who, through its officers, had both knowledge of and general control over this equipment.

A few minutes before midnight the longshoremen replaced the five insulation plugs in the No. 5 hatch prior to leaving for their midnight lunch. As soon as this had been done it became the duty of the reefer engineer, an employee of the petitioner, to turn on the blowers in the hold and to turn off the fixed hold lights. This is done in order to lower the temperature in the hold which inevitably rises while the plugs are off and the hold is being loaded.

At 1:00 A.M. the longshoremen returned to work. Their first task was to remove the plugs. The reefer engineer has the duty at this time to turn off the blowers and to turn on

the fixed hold lights. As pointed out in the Circuit Court, these hold lights are under the control of the ship's officers.[1]

Williams and another longshoreman climbed down onto the plugs and hooked the key plug onto a wire sling connected with the cargo winch. Both longshoremen then got out of the way, Williams by leaving the hatch. It is necessary to get well away because a plug is large and heavy and there is a probability that it may swing. There is no evidence as to where his partner went.

The winch lifted the plug and carried it over to the inshore deck of the ship where it was unhooked by two other longshoremen.

Williams then started back into the hatch to hook up the next plug. He came back by walking sideways along the coaming holding onto the guard rail until he was in position above the ladder which leads into the hold. At that point he stepped back and down to the first handhold on the ladder, slipped on the frost which had formed there and fell through the 9'6" by 4 foot opening into the hold, sustaining very serious and permanently disabling injuries.

The method used by Williams of leaving and returning to the hatch was one customarily used by longshoremen.

The usual lighting provided by a ship for night work while a hatch is being uncovered is as follows: permanent floodlights on the king posts, or masts, shining down in the area; some small amount of reflected light from the dock lights; portable cargo lights supplied by the ship; and fixed lights in the hold.

At the time Williams was injured, however, the floodlights from the king post and the lights from the dock were both blocked out by the presence of a large tent over the

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1. See opinion of the Circuit Ct. p. 2, Appendix, Petition for Writ of Certiorari.

hold, making the area like the inside of a circus tent with lighting on the outside only.[2] In fact, this covering is called a "Seattle Tent". The lights in the hold which throw light up on the ladder were not turned on. Substantially, the only lighting available was that given off by the cargo lights.[3]

After the hatch has been opened the cargo lights are hung down into the hatch. However, until the hatch has been opened, they cannot be hung down in this manner.

The usual cargo light, and presumably the ones supplied, is uninsulated. It uses a three hundred watt globe with a reflector. There is a wire cage over the front which is flat so that it can be placed face down when it is not in use. There are two ways to hold these lights: by a cord fastened to the base of the light or by holding the uninsulated base in the hand. The cargo lights were turned on at least eight hours before the accident.

When the cargo lights are sitting on the deck before the hatch has been completely opened, the hatch coaming blocks off most of the light they give from the hatch area.

The only place provided for lashing a cargo light so that it will light the hatch area is to the guard rail which runs in front of the winch driver. There is an ever present danger that it may be smashed by a swinging plug if this is done.

If a longshoreman were to hold a cargo light so that it shone in the area it would be almost impossible to hold the light in such a fashion as to give effective lighting and not run the very real danger of temporarily blinding one of the

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2. See picture included at the end of this statement.

3. As the Circuit Court said: "The evidence for appellee (respondent) tended strongly to show that the lighting above the plugs was insufficient to disclose the existence of the hazardous condition * * *." Opinion of the Cir. Court, page 2, Appendix, Petition for Writ of Certiorari. And see the precise description of the lighting situation following the sentence quoted.

constantly moving longshoremen in the partly opened hatch area or the winchdriver.

In the area by the ladder frost or ice had formed from the action of the cold air blown up from the hold striking the warmer air above.

Williams was unable to see that this area had frosted up, because of the inadequate lighting provided by the ship, and slipped on the frost and fell into the hold.

On the basis of the facts presented, the arguments made by counsel, and the instructions of the court, the jury found the defendant was negligent or the ship was unseaworthy because of inadequate lighting or the presence of frost or both, and returned a verdict in favor of the plaintiff. The Court of Appeals for the Ninth Circuit affirmed this verdict.

REASONS FOR DENYING THE WRIT

1. The Question of the Scope and Applicability of the So-Called Rule Pertaining to Transitory Conditions Is Not Relevant Under the Facts of This Case and No Right of the Present Litigants Depends Upon This Question.

The failure to provide adequate lighting occurred at least six hours prior to the injury; the condition of inadequate lighting was caused by the negligent failure of the shipowner himself to provide adequate lighting; the shipowner had actual knowledge of the inadequate lighting as well as general control over and supervision of the situation; and the injury was not caused by a foreign substance, but was due entirely to an inherently unseaworthy ship.

The ship owner has an absolute, non-delegable duty to provide a safe and seaworthy ship and appliances to longshoremen.

Seas Shipping Company v. Sieracki (1946), 328 US 85, 90 L.Ed. 1099, 66 S. Ct. 872;

Petterson v. Alaska SS Co., 205 F.2d 478, affd. without opinion by the United States Supreme Court in 348 US 914.

In the instant case petitioner failed to provide a safe and seaworthy ship and appliances,[4] by reason of its failure to supply adequate lighting among other reasons, and respondent longshoreman was injured solely because of this failure. The condition of lack of adequate lighting existed from the moment respondent longshoreman began to work on the ship.

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4. As the Circuit Court said, page 3, Opinion of the Circuit Court, Appendix Petition for Writ of Cert.: "In this state of the proof * * * the jury were not unwarranted in finding unseaworthiness or negligence, or both, on the part of the shipowner."

Even assuming it were true that the precise combination of circumstances causing the injury existed for only a relatively short period of time, this fact does not bring the case within the "rule" (if there can be said to be a rule) pertaining to "transitory conditions" because this combination of circumstances was caused by the condition of inadequate lighting facilities, which condition existed from the moment the injured longshoreman began his work. Thus, in *Poignant v. United States*, 225 F.2d 595, (2d Cir., 1955) where plaintiff slipped on an apple skin or other piece of garbage and was injured, the court held that although a ship does not become unseaworthy merely because of the temporary presence of a foreign substance, if the presence of this substance was caused by the lack of adequate equipment, the lack of garbage chutes in that case, then the vessel would be unseaworthy and the injured party would be entitled to a verdict. And in *Cookingham v. United States* itself, 184 F.2d 213, 1950 AMC 1793, cert. denied, 340 US 935 (1950), the court held only that the doctrine of unseaworthiness does not extend so far as to require the owner to keep appliances which are *inherently seaworthy* absolutely free from unsafe conditions.[5] In the instant case, however, the lighting was inherently unseaworthy since inadequate. Therefore, the so called *Cookingham* doctrine has no application to the present situation and does not exonerate a shipowner from liability for an injury caused by his failure to furnish inadequate lighting, even if the precise circumstances combining to cause the injury does not exist for an extended period of time.

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5. See *Cookingham v. United States*, 184 Fed. 2d 213, 1950 AMC 1793, cert. denied, 340 US 935 (1950). "We agree with the district court, however, that the doctrine of unseaworthiness does not extend so far as to require the owner to keep appliances which are *inherently sound and seaworthy* absolutely free at all times from transitory unsafe conditions * * *" (emphasis added)

Essentially negligence is unreasonable conduct.

Rest. Torts, § 282.

It is not unreasonable for a shipowner to allow a potentially dangerous foreign substance to remain on his ship for a long enough time for him to discover its presence when such substance was placed there by a third party and without the knowledge of the owner. It is unreasonable, however, and therefore negligent for a shipowner himself to cause a dangerous condition. A dangerous condition caused by a shipowner or his agents can not be a condition of which the shipowner has no knowledge. The law does not pardon the unreasonable conduct and negligence of a shipowner and exempt him from liability therefor simply because the negligent acts did not exist over an extended period of time. Thus, in *Boudoin v. Lykes Bros. S.S. Co.*, 348 US 336 (1954), a case in which a seaman recovered for injuries inflicted by the viciousness of a fellow seaman, the negligent act was hiring the vicious seaman. The fact that this act of hiring did not require much time was not held to excuse the shipowner. It is unreasonable and therefore negligent to hire a vicious seaman and it is likewise negligent to provide inadequate equipment, rendering the ship an unsafe place in which to work. In the case of *Brabazon v. Belships Co.*, 202 F.2d 904 (3d. Cir. 1953), 1953 AMC 737, where a stevedore was injured by the breaking of a board the condition of which he was unable to see because of inadequate lighting, the court held the shipowner liable, stating at page 909-910: "Finally, it is clear that the inadequacy of the board which broke to support a man's weight would have been apparent but for the darkness. Light would have made the danger obvious and would have enabled the workman to avoid it. Accordingly, we conclude that the negligent failure of the ship to supply needed lights was a responsible

cause of (longshoreman's) injury * * *" It is true that the court found that the mere fact that the board was defective was not enough to render the shipowner negligent, but this was not simply on the grounds, as seemingly implied by petitioner, that the shipowner had no knowledge of or time in which to acquire knowledge of the defective condition of the board. Rather the court found the shipowner not negligent for the breaking of the board alone because the owner did not supply the board and in fact the source of the offending board was unknown, and futhermore it held such a board not a part of a ship's gear and not an appliance thereof. The condition of inadequate lighting, however, which was caused by the shipowner and known to him was held to be negligence and there was no discussion of the length of time during which this condition had existed. Any discussion of transitory conditions was addressed to the question of discovery by the shipowner of the defective condition which was not caused by him, the board, and none of it was directed to the question of the inadequate lighting condition which was known to and caused by the shipowner.

Similarly, in *Guerrini v. United States*, 167 F.2d, 352 (2d Cir. 1948), where a bricklayer was injured by slipping on some grease, the court affirmed the duty of the shipowner to provide a reasonably safe place to work. In view of this affirmation, the language in the case to the effect that the shipowner's negligence depended upon the length of time the grease had been on the deck can only be understood as based upon the assumption that the owner was not shown to have been responsible for the grease being on the deck and therefore had no knowledge of its presence. As a matter of fact there was no evidence at all on the question of how the grease got on the deck. Such a case is not authority

for the proposition that a shipowner is excused from liability for having himself created an unreasonable and dangerous condition simply because his unreasonble and negligent acts did not require much time for their consummation.

Seaworthiness is an absolute warranty by the shipowner and does not depend upon negligence.

Seas Shipping Company v. Sieracki, 328 US 85 (1946);

Petterson v. Alaska SS Co., 205 F.2d 478, affirmed 348 US 914.

This does not mean, however, that a ship must be absolutely fit and 100% safe, it simply means that a ship must be reasonably fit.

Poignant v. United States, 225 F.2d 595 (2d Cir. 1955).

The *Cookingham* case, supra, held only that the absolute warranty of seaworthiness is not breached by the presence of a foreign substance when there is no showing of how it got on the ship, when the owner had no knowledge of or control over its existence, when the owner did not have sufficient time to discover its presence, and *when the ship is not inherently defective.*[6]

That is to say, the court found such circumstances did not render the ship unreasonably unfit. In the instant case the circumstances are very different and therefore not controlled by the *Cookingham* case. Here the condition of the ship was inherently defective because the lighting equipment was inadequate and this defective condition was caused by the shipowner and known to him and subject to his control. This situation renders the ship unreasonably unfit.

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6. See footnote 5 p. 8 supra.

Thus, in *Petterson v. Alaska SS Co.*, 205 F.2d 478, aff'd without opinion 348 US 914, a shipowner was held liable to a stevedore for injuries inflicted by a breaking block even though the block was brought on board by the stevedoring company. The court declared at page 479, "It is not necessary to show, as it is in negligence cases that the shipowner had complete control of the instrumentality causing the injury; or that the result would not have occurred unless someone were negligent. It is only necessary to show that the condition upon which the absolute liability is determined —unseaworthiness—exists. (*Mahnich v. Southern SS Co.*, 321 US 96, 64 S.Ct. 455, 88 L.Ed. 561)." In this case there was no discussion of the period of time during which the block had been defective. The court simply found that the block broke and that a reasonably fit block would not have broken and concluded that this established unseaworthiness. This holding, affirmed by this Court, clearly shows that the element of time discussed in the *Cookingham* case has no application to inadequate appliances—or in the words of the *Cookingham* case itself, inherently defective appliances. It applies only to dangerous foreign substances not shown to have been on the ship as a result of the negligence of the owner, because only in that situation does the element of time render the dangerous condition not unreasonable and therefore not unseaworthy.

Shannon v. Union Barge Line Corp., 194 F.2d 584 (3rd Cir. 1952) interpreted the *Cookingham* case in the above way. In the Shannon case a barge employee slipped on some oil. The court asked the question, "Assuming that there was oil on the deck, how did it get there and who put it there?"[7] And then the opinion stated "(T)he record is silent of any testimony that the oil was tracked onto the deck by the em-

7. *Shannon v. Union etc.* at p. 585.

ployees of the ship." And finally the court declared, plaintiff's "own testimony * * * eliminates the suggestion that prior to this accident only the ship's crew had access to the deck. We are then in the same situation as that shown in our case of" *Cookingham*.[8]

Similarly, it was stated in the *Poignant* case, supra, at page 597-8; "The *Petterson* case, later decided, makes it plain that the results reached in this line of cases (*Cookingham*) cannot be justified by the mere fact that the existence of such a condition was not brought to the knowledge of the owner or that he lacked the opportunity to prevent or correct the condition." The opinion then points out that the *Cookingham* case decided only that the situation there involved was not so unreasonable as to render the ship unseaworthy. And finally the court held that if the offending garbage on which plaintiff slipped was caused by inadequate equipment, that condition would constitute unseaworthiness and would not be governed by the *Cookingham* doctrine. The fact that garbage may not have been on the deck very long, did not excuse the shipowner's failure to provide adequate equipment.

In fact, we are unable to locate any cases in which the failure of a shipowner to provide adequate appliances and lighting has been found not to render the ship unseaworthy merely because of some transitory notion. Petitioner has not been able to point out any such cases to us.

In *Adamowski v. Gulf Oil Corporation*, 197 F.2d, 523 (3rd Cir. 1952), 1952 AMC 1221, affirming 93 F. Supp. 115 (E.D. Pa. 1950) the crucial finding upon which the court based its holding that unseaworthiness had not been proved was that the passageway in which the injured plaintiff slipped was

8. Ibid.

"perfectly sound."[9] There was no evidence of whether the temporarily dangerous condition was caused by the ship or some third party. "Again, the plaintiff has not offered any proof whatsoever that the defendant knew or should have known of this unsafe condition."[10] If the condition had been caused by the defendant or his agents it could not be said he was without knowledge of its existence.

Shannon v. Union Barge Line Corp., supra, is, like the *Adamowski* case, another slipping case. The claim of unseaworthiness was based upon the presence of a bar across a door against which plaintiff fell when she slipped. The court found this bar did not render the ship unseaworthy because it was not hidden and because there was another available safe means of egress which the plaintiff might have chosen. Any discussion of time in the case was addressed purely to the question of negligence, not unseaworthiness, in allowing an alleged spot of oil to remain on the deck. The court held that allowing this post to remain did not constitute negligence because it was not shown how it got there and in fact the plaintiff's "own testimony * * * eliminates the suggestion that prior to this accident only the ship's crew had access to the deck."[11]

In *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3rd Cir. 1952) plaintiff fell and was injured because of inadequate lighting. The court found that the ship was unseaworthy because of the failure of the lighting. The following was stated, at page 789, on the meaning of unseaworthiness: "The basic elements of the doctrine are now well settled.

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9. *Adamowski v. Gulf Oil Corporation*, 197 F.2d. 523 (3rd Cir. 1952), 1952 AMC 1221, affirming 93 F. Supp. 115 (E.D. Pa. 1950) at p. 117.

10. Ibid.

11. *Shannon v. Union Barge Line Corp.*, 194 F.2d 584 (3rd Cir. 1952) at page 585.

Ever since *The Osceola,* 1903, 189 US 158, 23 S.Ct. 483, 487, 47 L. Ed. 760 it has been the law that 'the vessel and her owner are * * * liable to an indemnity for injuries received * * * in consequence of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.' The disjunctive used must be regarded as introducing a further explanation of the nature of unseaworthiness, for several of the cases to which *The Osceola* referred involved 'not providing proper appliances, so that the case was one * * * of unseaworthiness.' " It is true that the court did mention the fact that the inadequacy of the lighting system was known to the ship for forty-eight hours before the accident, but in view of the above quoted passage and the opinion as a whole this must be regarded as dicta not necessary to the holding. Perhaps it was included because of some uncertainty about the meaning of the *Cookingham* case, but if there ever was any such uncertainty certainly it has been clarified by the decision of this court in the *Petterson* case.

In *Brabazon v. Belships Co.,* 202 F.2d 904 (3rd Circ. 1953) 1953 AMC 737, where a stevedore was injured by the breaking of a board the condition of which he was unable to see because of inadequate lighting, the injured plaintiff based his claim on negligence alone and the question of seaworthiness was never discussed. The court held the failure of the ship to provide adequate lighting was negligence. For a fuller discussion of the treatment of the negligence question in this case, see brief pages 9-10 supra.

Boyce v. Seas Shipping Co., 152 F.2d 658 (2d Cir. 1945), 1946 AMC 45, is another slipping case. The crucial fact upon which the non-liability of the shipowner was based was that there was no evidence that any grease or other slippery substance was present at all. Thus at page 658: "The judge's finding of fact was not 'clearly erroneous' that 'there was no

credible' evidence in this case that either the galley or alleyway was wet or greasy * * *.'" It is true the opinion did also mention that the evidence did not show that the shipowner had knowledge of the condition but in view of the above this would seem irrelevant and, furthermore, if the condition had been due to his action, he would of necessity have knowledge of it. The court did expressly assume that there are occasions when a ship may be liable for an oily or greasy pantry floor, but, quite naturally, it found this was not such a case since there was no evidence that an oily or greasy pantry floor existed.

Poignant v. United States, has been discussed, supra. It is another slipping case. It held simply that although a ship is not necessarily rendered unreasonably unfit and therefore unseaworthy by the mere temporary presence of a foreign substance, the cause of which presence is unexplained, if the cause of the presence of the foreign substance is an inadequate appliance the ship is unseaworthy.

Grillea v. United States, 232 F.2d 919 (2d Cir. 1956), was a case involving not inadequate appliances but rather the failure by the crew to use properly the adequate appliances which were provided. Even so, the court found the ship to be unseaworthy, The plaintiff was injured by falling through a perfectly sound hatch cover which gave way because he himself had put it on incorrectly a short time before the accident. Nevertheless the court found that the ship with the hatch-cover in such a condition was unseaworthy. The shortness of the time during which the condition existed was not held to bar recovery and any discussion of this matter was not addressed to the question of time itself but to the question of whether the situation was an intermediate step in an operation, making the ship unseaworthy, or whether it was simply an incident in a continuous operation.

The decision of the court below is not inconsistent with the *Cookingham* case. It correctly stated that even if the condition of inadequate lighting be regarded as "transitory," that fact would not serve to absolve the petitioner of liability in this case. This statement is correct because the basis for the holding in the *Cookingham* case was the lack of knowledge and control, the fact that the dangerous condition was not caused by the shipowner, and, most important, the finding that the ship was inherently seaworthy. In the instant case the shipowner had both knowledge and control, he himself caused the dangerous condition, and the ship was inherently unseaworthy because of the inadequate lighting provided by the shipowner. The *Cookingham* case does not apply to such a situation and, as has been shown above, no case has ever held that it does. In any event, the decision below did not hold that the condition of inadequate light was "transitory" and in fact it was not, since the failure by the ship to provide adequate lighting occurred at least six hours prior to the accident. Therefore, the decision below can not be inconsistent with *Cookingham v. United States* because no "transitory" condition was involved and even if such a condition were involved the case is clearly distinguishable on other grounds.

The distinctions between the failure to provide adequate lighting in the instant case and the jello on the stairs in the *Cookingham* case are (1) the failure to provide adequate lighting was not transitory and even if the particular combination of circumstances causing the injury was of short duration, the *Poignant* case clearly holds that this is not enough to excuse the failure of the ship to provide adequate appliances under some "transitory" notion; (2) the failure to provide adequate lighting was caused by the shipowner himself and therefore within his knowledge whereas it was

not shown how the jello got on the stairs and certainly it was not proven that agents of the shipowner put it there or the court could not have said that the shipowner had no knowledge of its existence; (3) the lighting was at all times under the control and supervision of the ship; and (4) the failure to provide adequate lighting rendered the ship *inherently* unseaworthy, just as a ship with a defective cotter key in the king post for 6 seconds, or 6 hours or six days, would be inherently unseaworthy, whereas the ship in the *Cookingham* case was inherently seaworthy.

In no case dealing with the so-called "transitory" rule has the evidence clearly shown that the alleged transitory condition was caused by the vessel or her personnel. For a discussion of the *Adamowski* case, see brief p. 13 supra. In the case of *Holliday v. Pacific-Atlantic S. S. Co.*, 99 F. Supp. 173 (D. Del 1951), rev'd on other grounds, 197 F.2d 610 (3rd Cir. 1952), cert. denied 345 U.S. 922 (1953) the court had this to say, at pages 177-8, on how the injury causing substance became where it was: "There is no direct evidence to show how or why the wires were protruding from a box or package * * *; there is nothing to indicate that that condition was caused by any negligence on the part of any of respondent's officers or employees, or * * * that the ship's officers knew of it." In *Stopler v. United States* (E.D. Pa. 1950), 1950 (AMC 551), the court expressly found that there was no evidence that any of ship's personnel had dropped the bit of food causing the injury. Likewise in *Daniels v. Pacific-Atlantic S.S. Co.*, 120 F. Supp. 96 (E.D. N.Y. 1954) 1954 AMC 806, there was no evidence at all on the question of how the offending substance got where it was. The court stated at page 99: "The *mere* presence of grease or oil or other transitory substance on a deck of a vessel, causing one to slip * * * has been held not to constitute unseaworthi-

ness." (Emphasis added.) And at page 99 "The weight of authority is that an injury caused by slipping on a spot of oil or other matter of a transitory nature *in and of itself* does not support a cause of action for * * * unseaworthiness." (Emphasis added.) Thus, the court held only that the *mere presence* of a foreign substance *in and of itself* does not constitute unseaworthiness. This can hardly be said to be a holding that if the presence of the substance were due to the negligence of the ship or her personnel even so the vessel would not be unseaworthy. And in *Blodow v. Pan Pacific Fisheries, Inc.*, 128 Cal. App. 2d 428, 275 P.2d 795 (1954) the court found that there was no evidence of how the offending oil got where it was. "If any of the ship's authorized personnel knew, or should have known, of the presence of the foreign substance, their actual or constructive knowledge would be imputed to the shipowner. Since the evidence here did not disclose knowledge by any of respondents' employees * * *"[12] If none of the employees knew of the condition it can not be said that they caused it.

As indicated above, the shipowner has an absolute and non-delegable duty to provide a safe and seaworthy ship and appliances to longshoremen. It is true that a ship need only be reasonably fit, not absolutely safe, but no case has ever held a ship to be seaworthy under the facts here involved.

It is respectfully submitted that in the *Cookingham* case a *theory* of "notice" was confused as many state courts have confused the requirement of "notice" in "slipping" cases. The basic situation is that a patron-invitee slips in a store on a foreign substance in one of the aisles. Most of the states hold no liability without proof of notice to the

12. *Blodow v. Pan Pacific Fisheries, Inc.*, 128 Cal. App. 2d 428, 275 P.2d 795 (1954) at p. 435.

defendant owner sought to be charged of the presence of the foreign substance or in some cases, proof of the elapse of a period of time sufficient to cause a reasonably prudent shopkeeper to acquire notice or to remove the substance.

But, and here we respectfully submit, is where many state courts have been confused, if the foreign substance was placed or dropped on the floor of the store by an *agent* or *servant* of defendant storekeeper, then defendant storekeeper is chargeable via respondiat superior because of his agent or servant's negligence *and no notice is necessary to him since be is presumed to have notice of an act by his vicarious ego, to-wit, the agent or servant.*

If the doors of a store open at 9 a.m., and the first person in the store slips on a foreign substance, we respectfully submit that notice would not be necessary since the foreign substance could only have been put there by an agent of the defendant storekeeper while or during the time the store was locked overnight. Is not a boat similar to a "locked store"? The only person who could deposit a foreign substance on the boat would be the agent of the defendant, since by law they cannot be the agent of a plaintiff seaman, the fellow servant rule being abrogated in admirality.

We respectfully submit the case at bar can be clearly distinguished from the *Cookingham* case; but we further respectfully submit that to the extent that the *Cookingham* "doctrine" may apply to a transitory condition such as a foreign substance on the deck of a freighter, where every person is an agent of the defendant, and in that situation require "notice" of the presence of the foreign substance, to that extent the *Cookingham* "rule" is not sound law and has confused its factual hypothesis and the legal conclusions flowing therefrom.

No case has ever held that the *Cookingham* case applies to the situation here involved. Nor has any case ever held that the only duty of a person who himself has negligently caused an unsafe condition is to correct the condition within a reasonably short period of time. One who negligently causes a condition can not claim to be without knowledge of his own acts, and therefore any doctrine dealing with the duty to correct a condition after it has become known or ought to have become known must refer to conditions caused by the negligence of some third party. These are the universally accepted principles of the law of negligence applicable to employees and business invitees.[13]

The holding of the court below does not conflict with any decisions of this Court.

This Court in *Boudoin v. Lykes Bros. S.S. Co.*, 348 US 336 (1954) correctly stated that an owner is liable for the acts of a drunk seaman only if that seaman had a wicked disposition, a propensity to evil and the like. Quite correctly this means that a vessel is not unseaworthy because a seaman of average disposition becomes dangerous because of intoxication and assaults another seaman, but this is not because such an occurrence would be a so-called "transitory" condition. The reason is simply that if the crew are of normal disposition then the ship is reasonably fit and reason-

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13. Thus, the occupier of premises owes a duty to business invitees to use reasonable care to keep the premises in a reasonably safe condition. *Freeman v. Nickerson*, (1946) 77 Cal. App. 2d 40, 174 P.2d 688; *Le Blanc v. Atlantic Bldg. Supply Co.*, (1949) 323 Mass. 702, 84 N.E. 2d 10; and *Swift & Co. v. Schuster*, (1952) CCA 10, Utah, 192 Fed. 615 (a government meat inspector was injured as the result of a fall while stepping from a raised inspection platform to wet, slippery and greasy slaughter floor. In holding he was a business invitee, it was stated that the meat packing corporation owed him the duty to keep and maintain the premises in a safe condition).

And see Rest. Torts, §§ 341, 343; Prosser, Torts 2nd Ed. 1955, §§ 67, 78.

able fitness is all that is required. This is not authority for the proposition that a ship with inadequate lighting is reasonably fit and therefore seaworthy, and no case has ever so held.

This Court in the *Boudoin* case did not trouble itself over the question of whether the act of hiring the seaman required much time, nor did it discuss the question of whether the actual assault took much time. It held that a seaman of vicious nature is an inadequate seaman and therefore the ship is unseaworthy. The court below held that lack of light is inadequate lighting and therefore the ship is unseaworthy. These decisions are entirely compatible.

The case of *Poignant v. United States*, supra, was not decided in this Court. It has been analyzed above. Examining the quotation from the opinion in this case contained in petitioner's brief, pages 17-18, we find "(S)o it does not become unseaworthy by reason of a temporary condition caused by a transient substance *if even so the vessel was as fit for service as similar vessels in similar service.*" (Emphasis added.) The material quoted pertained to the presence of some garbage and the court specifically stated that the evidence did not show how the garbage got where it was. The court then concluded that if the presence of the garbage was due to an inadequacy of the ship's garbage chutes, the ship would be unseaworthy. In other words, if the garbage chutes were inadequate the vessel would not be as fit for service as similar vessels in similar service. The opinion below held that since the ship's lighting was inadequate the vessel was not as fit for service as similar vessels in similar services and was therefore unseaworthy. The holdings are consistent.

A more recent decision by this Court on the subject is the case of *Petterson v. Alaska S.S. Co.*, supra. This case has

been elucidated, above, and is not inconsistent with the holding of the court below.

This Court cannot settle the question of the application of the so-called "transitory condition rule" to the doctrine of unseaworthiness by reviewing this case. At the most it could pass upon the question of the application of this "rule" to the facts involved in the instant situation. This is unnecessary because the application of this "rule" to the facts here involved is clear and the decision on this matter by the lower court is consistent with all the cases decided by this Court and other courts of appeal. Furthermore, the question of the so-called "transitory condition rule" is not even reached in the instant case because the lower court based its decision on the ground of negligence as well as unseaworthiness. Therefore, no substantial rights of the parties here involved are affected by the question of the application of the so-called "transitory condition rule" to the doctrine of seaworthiness, which question petitioner has asked this Court to review. A quote from the opinion below makes this plain: "In this state of the proof on appellee's behalf the jury was not unwarranted in finding unseaworthiness, or negligence, or both, on the part of the shipowner."[14]

This case as it now stands could not serve as authority for the horrors paraded on page 18 of petitioner's brief. The condition here involved was not fortuitous but was caused by the negligence of the shipowner. The condition caused by the negligent failure of a shipowner to provide adequate lighting is rather unlike the condition existing as a mast struck by lightning tumbles toward the deck.

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14. Opinion of Cir. Ct. p. 3, Appendix, Petition for Writ of Cert.

The question of the application of the rule which has been applied to so-called "transitory" conditions is well settled in so far as it may pertain to the facts in the instant case. It does not require further review here. And it should not be reviewed here because no substantial right of the litigants depends upon this question.

2. Liability of a Shipowner Who Has Furnished Equipment Which May Have Been Adequate for Certain Purposes but Which Was Inadequate and Unsuitable for the Work Required to Be Performed.

The evidence in this case shows that although the shipowner supplied certain lighting equipment, there was no possible way this equipment could have been manipulated to provide adequate lighting. Thus, there was evidence which showed that three cargo lights were furnished by the shipowner to the longshoremen and that this was the only effectual lighting available at the time the longshoreman, Williams, fell. The question of whether these cargo lights provided or could have provided sufficient illumination was sharply controverted and the jury decided adversely to the petitioner. This finding has been concurred in by the court below. The only other lights available were the hold lights, certain fixed flood lights, and certain dock lights. There was evidence that the hold lights were not turned on even though it was the duty of the shipowner to turn them on, and there was evidence that the flood lights and dock lights were blocked out. Based upon this evidence the jury returned a verdict adverse to the petitioner and the court below concurred.

This is not a case in which adequate equipment has been provided but used improperly or not used at all. Lighting equipment which can not possibly be used in such a manner as to afford sufficient illumination can not be said to be

adequate. The mere fact, if it be a fact, that this equipment could have furnished adequate illumination for certain purposes not involved in the situation under consideration does not render it adequate. The fact remains that the equipment furnished by the shipowner was not capable of adequately illuminating the work of the longshoreman on his vessel. The jury passed upon this question and the lower court concurred with the jury's decision.

In view of the fact that the equipment furnished by the shipowner was not adequate to provide illumination for the longshoremen engaged in loading its vessel, the question of the liability of a shipowner who has furnished adequate equipment is not reached. Under the facts of the present case it is impossible for this Court to review this question.

Perhaps the question raised by petitioner is important but it is not reached under the facts of the instant case. Such a question is hardly an appropriate subject for review by this Court.

3. Failure of an Appliance to Be Operated for Purpose for Which Suitable, in Conjunction with Failure to Provide Any Other Appliance Which Could Have Accomplished the Purpose, Does Render a Vessel Unseaworthy When the Result of the Failure to Operate and the Failure to Provide Is a Condition of Inadequate Illumination.

The respondent, Williams, was injured because of lack of adequate lighting. There was testimony that certain hold lights were not turned on. It was the duty of the shipowner to turn on these lights. There was testimony that had these lights been turned on they would have provided light in the area from which respondent Williams fell when he incurred his injuries. There was testimony that the other lighting equipment furnished by the shipowner was incapable of illuminating this area. Under these circumstances the jury

found adversely to the petitioner and the court below concurred.

Petitioner does not contend that a vessel is seaworthy if its lighting is inadequate. The failure of the owner to turn on the hold lights was only one of the owner's failures and taken in conjunction with the others this failure created a condition of inadequate lighting and therefore unseaworthiness.

The failure to turn on the hold lights was not the basis of the decision below. The basis of the decision was the failure to provide adequate lighting and the failure to turn on the hold lights was simply one cause of this condition. Therefore, the question raised by the petitioner is not reached under the facts of this case.

If it were admitted that the failure to turn on these hold lights in and of itself did not constitute unseaworthiness, it is hard to see how this fact cures the failure to provide adequate lighting, upon which failure the conclusion of unseaworthiness was predicated. Therefore no substantial right of the litigants in this case depends upon the question of whether the failure to have on the hold lights in and of itself constitutes unseaworthiness.

Irrelevant though it may be, we will take up petitioner's contention.

This is not a situation in which an item intended for one purpose is used for another. This might be a reasonable argument if a longshoreman had been using a hatch light fixture to lift cargo. Cases cited by petitioner fall in this category. This is a situation in which an item was not used at all, even though suited to the purpose in question and probably intended for that purpose. Lights have but one use, that is, to provide illumination. The intention of the shipowners in providing these lights was presumably to pro-

vide illumination in the hatch area and whether they would provide and were intended to provide light in one area and not in a place three or four feet away is a question of fact which was argued to the jury.

Holub v. Sword S.S. Line, 132 Fed. 2d 206 (5th Cir. 1942) 1943 AMC 898, held that a shipowner was not liable on the grounds of unseaworthiness of his ship for an injury resulting from the use of an appliance for a purpose for which it was not intended when adequate appliances for the purpose were provided. This is hardly authority for the proposition that the failure to use hold lights for a purpose for which they were suitable, and perhaps intended, does not constitute unseaworthiness when no other appliances were available which could have accomplished the purpose for which the hold lights were suitable. Likewise in the case of *Hunt v. Hobbs, Wall & Co.*, 42 F.2d 437 (9th Circ. 1930), 1930 AMC 1390 the situation was one in which the injury was caused by the use of equipment for a purpose for which it was not intended, not the failure to use equipment for a purpose for which it was suitable and perhaps intended. And even in that situation the court was careful to point out that there was equipment available by means of which the job could have been performed with safety. In the instant case, there was no equipment which could have provided adequate illumination except the hold lights.

We agree with petitioner's contention that seaworthiness has always been held to mean adequate for the purpose intended and ordinarily used. The holding of the court below was that the lighting of the ship was not adequate for the work of the longshore which was the purpose intended. The court below did not find that the vessel was unseaworthy simply *because* hold lights were not operating. Indeed petitioner does not even claim this. The precise

language of petitioner's claim is "Consequently the holding of the court below, that the vessel was unseaworthy *when* an appliance was not operating for a purpose for which never intended or customarily used, is contrary to the concept of seaworthiness adopted by this court." (emphasis added)[15] Whatever meaning this quoted sentence may have it is not supported by any cases cited by petitioner.

4. Sufficient Evidence Was Adduced to Support the Concurrent Findings of Two Courts Below That Respondent Williams Was Injured Due to the Negligence of the Shipowner or Unseaworthiness of the Vessel.

Each and every factual issue urged by petitioner here either was or could have been argued to the jury. The jury decided adversely to him and found that the ship was unseaworthy or that the shipowner was negligent or both.

On disputed questions of fact the verdict of a jury will be treated as controlling for even if the question is a close one that fact will not justify either the trial judge or the reviewing Court in usurping the function of the jury.

Gardiner v. The New York & Porto Rico SS Co., 146 F.2d 420 (CCA 2d 1944);

Jacob v. City of New York, 315 US 752, 757, 86 L.Ed. 1166, 62 S.Ct. 854;

Norris, the Law of Seamen, Sec. 697.

In the trial court it was found as a matter of fact, based on substantial evidence, that the shipowner failed to provide adequate lighting. The Court below concurred. The Supreme Court will not ordinarily disturb concurrent findings of fact by two courts below.

See, e.g.,

Workman v. New York, N.Y. 1900, 21 S.Ct. 212, 179 US 552, 45 L.Ed. 314;

15. Petition at p. 25.

The Linseed King, N.Y. 1932, 52 S.Ct. 450, 285 US 502, 76 L.Ed. 903;

Anderson v. Abbot, Ky. 1944, 64 S.Ct. 531, 321 US 349, 88 L.Ed. 793, 151 ALR 1146, rehearing denied 64 S.Ct. 845, 321 US 804, 88 L.Ed. 1090.

And the Supreme Court will not grant a writ of certiorari to review evidence and discuss specific facts.

See, e.g.,

General Talking Pictures Corp. v. Western Electric Co., 304 US 175, 178, 58 S.Ct. 849, 82 L.Ed. 1273;

N.L.R.B. v. Waterman S.S. Co., 309 US 206, 208, 60 S.Ct. 493, 84 L.Ed. 704.

See generally,

Robertson & Kirkham, Jurisdiction of the Supreme Court, Sec. 333, and the many cases discussed therein.

As indicated supra, the basis of the decision of the court below was the failure of the shipowner to provide adequate lighting. The fact that the shipowner failed to turn on hold lights which would have provided some illumination was simply one factor in the failure to provide adequate lighting. Even if it were admitted for the sake of argument that these hold lights would not have provided any illumination in the area in question, this fact could not cure the failure to provide adequate lighting. Therefore, the question of whether or not the hold lights would illumine a certain area is not reached under the facts of this case, is insubstantial, and is a question upon which no rights of the litigants in this case depends. Such a question will not be reviewed by this Court.

There is no direct evidence in the record of whether or not the hold lights, if on at the time respondent Williams suffered his injury, would have cast light on the area from which he fell. It is perhaps impossible to present direct evidence on this question since the lights were not on at the crucial time. The most that can be done is to present evidence from which it might reasonably be inferred that if the lights had been on they would have illuminated the area. Respondent introduced such evidence at the trial. The record is replete with testimony regarding the nature of the hold lights, their distance from the area in question, the wattage of these lights, and the like.

At the trial petitioner introduced the testimony of a man who had visited the scene of the injury long after its occurrence. This man testified only that at the time he visited the scene he did not happen to notice that turning on the hold lights made any difference. Counsel for respondent sought to introduce testimony of a man who was present at the time of the accident on whether at that time the hold lights would have made a difference in the visibility at point from which respondent fell. The court prevented him from introducing this testimony.

The jury considered the evidence introduced by petitioner and respondent and returned a verdict adverse to the petitioner. The court below found that the jury might reasonably have inferred from the evidence in the record that the hold lights, if on at the time of the injury, would have cast light upon the place from which respondent Williams fell.[16]

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16. See Opinion of Circuit Ct., p. 3, Appendix, Petition for Writ of Cert.

THE DECISIONS OF THE COURT BELOW ARE CORRECT AND NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS.

Penna. R. Co. v. Chamberlain, 288 US 333 (1933), and the other cases cited by the petitioner do not apply to the present situation in which the record contains no direct or positive evidence on the instant question. Extended quotation from *Penna. R. Co. v. Chamberlain* will show the real holding in that case. "The case for respondent rests wholly upon the claim that the fall of deceased was caused by a violent collision of the string of nine cars with the string ridden by the deceased. Three employees, riding the nine-car string, *testified positively that no such collision occurred. They were corroborated by every other employee in a position to see* * * *. The only witness who testified for the respondent was" * * * a man who did not testify that there was a collision, but only testified to facts from which it could be inferred that there was such. (Emphasis added.) "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible *in the face of positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist.* * * * *A rebuttable inference of fact* as said by the court in the Wabash Railroad case 'must necessarily yield to the credible evidence of the *actual occurrence.*'" (Emphasis added.)

In the instant case there is no positive testimony that if the hold lights had been on at the time of the injury they would not have cast light upon the area from which respondent Williams fell. There is no positive testimony contradicting the possible inference by the jury that they would have.

The evidence introduced by petitioner was merely the testimony of a man, who was not present at the time of the injury, that at the time he visited the scene, long after the injury, he did not notice that turning on the hold lights made any difference.

In all the cases cited by petitioner in footnote 19, page 26 of its brief, the facts were similar to the *Penna. R. Co.* case. These cases simply hold that an inference must yield to direct, positive, uncontradicted, unimpeached, and corroborated evidence of the existence of a fact. Petitioner failed to introduce any such evidence in the instance case, and probably the question here involved is not even susceptible to this sort of proof.

Sickles v. Graybar Electric Company, 219 F.2d 847 (7th Cir. 1955) cited by petitioner, while holding adversely to the plaintiff on the ground that an inference from circumstantial evidence must yield to positive and direct testimony, contains an edifying statement at p. 854: "Plaintiff cites and relies upon a number of cases which hold that a verdict may be sustained on circumstantial evidence. An examination of these cases discloses that they are of little if any aid to plaintiff in the instant situation. *Generally there was direct proof that the defendant committed or was responsible for an act and it was held that whether the act constituted negligence was a matter to be inferred by the jury from the circumstances.*" (Emphasis added.)

Substantial evidence was introduced that frost was present at the point at which respondent Williams fell. Even if such evidence had not been introduced, however, it would not constitute grounds for review by this Court. The holding below was that either the ship was unseaworthy or the shipowner was negligent or both. The basis of this holding was the lack of adequate lighting. The presence of the frost

merely heightened the fact that the inadequate lighting was the cause of the injury. There is no evidence in the record showing that the injury would not have occurred if the frost had not been on the area from which respondent Williams fell. Even if the jury had not believed the testimony tending to show that in fact frost was present, still they might reasonably have found that the lack of lighting was the cause of the injury. Therefore the question of evidence of frost raised by petitioner is not reached under the facts involved in this case. The question is insubstantial here. No right of the litigants here involved depends upon the answer to this question. It is not a fit subject for review by this Court.

The evidence introduced at the trial does not show conclusively which foot of respondent Williams slipped, the foot on the coaming or the foot on the ladder. The meaning of the language used by Williams in his testimony about how he fell is susceptible to more than one interpretation. That it was the foot on the ladder which slipped is a reasonable interpretation of the evidence. This particular point was not argued on trial nor mentioned at the time petitioner was making his motion for a directed verdict. If there are two possible interpretations of the meaning of words used and two possible inferences to be drawn from the meaning then the inference which will support the verdict of the jury should, of course, be drawn. The opinion below states that "He stepped back and down seeking to step onto a bar affixed within a recess in the coaming. * * *"[17] This language does show that Williams had one foot on the coaming when he slipped, but it does not show whether it was the foot on the coaming or the foot on the bar (ladder), onto which he stepped back and down, which slipped. In fact petitioner

17. Opinion of Circuit Ct., p. 2, Appendix, Petition for Writ of Cert.

does not even claim that it was not the foot on the ladder or bar which slipped. Petitioner only claims that plaintiff slipped "when he had one foot on the hatch coaming."[18] The fact that he had one foot on the coaming does not mean it was that foot which slipped.

At the trial counsel for the respondent Williams introduced both eyewitness and expert testimony on the question of frost. Counsel for petitioner also called an expert witness to dispute the issue. The jury heard both opinions.

Relevant extracts from the testimony of Houston Hall, an eyewitness, is as follows:

> "Q. Then you were pointing right here, is that correct?
>
> A. I could see the frost, it was formed, ice was, approximately, ice up here, but it was frosty up here, from where the plug was pulled out. Naturally, that pressure from the fan blows up and it blows that cold air, stuff, out and it forms." (141)
>
> • • • • • • •
>
> "Q. Is that where you saw the frost?
>
> A. I saw it up here, it was forming, you know, the fog.
>
> Q. You mean up in this area here, is that right?
>
> A. Yes.
>
> Q. Along the face of the iron, is that what you are telling us?
>
> A. Yes, in here, yes, because when they puttled the plug up, well naturally, the cold air blowing with the blowers on, it sheets it up." (142)

Relevant parts of the testimony of Jim Hotchkiss, a refrigeration engineer, are as follows:

> "Q. Mr. Hotchkiss, let's take this area, this enclosure here, for instance. If this area is closed, as

18. Pet.'s brief p. 27.

shown up here in Plaintiff's exhibit No. 2, and the air in that area below is refrigeration to 10 degrees, and then that area is opened by lifting out a section of it, as shown here in Plaintiff's exhibit No. 1, resulting in an opening as shown in Plaintiff's exhibit No. 3, and the air outside here, prior to the removal of this object here, was 52 degrees, would the meeting of those two airs at different temperatures cause any foreign—any substance at all to be deposited in the area shown here. And I will mark this.

A. Use my pen.

Q. All right, mark it L-1."

* * * * * * *

"The Court. All right, now you can answer the question.

The Witness. It would cause, as the temperature dropped, an immediate temperature drop and precipitation of moisture here. You have a difference of 10 degrees below, there's 52 degrees here. I would say that there would be an immediate temperature drop to below 32, causing, as she dropped, precipitation of moisture from the atmosphere, then freezing of such moisture at that point." (196, 197)

The testimony of the above witnesses was thus to the effect that on the night respondent Williams was injured there was frost on the hatch coaming in the vicinity of the ladder (the word "iron" used by Hall meant the coaming) and expert testimony that this was a natural and usual physical phenomenon.

The testimony of the expert was not patently in error, as contended by petitioner in its brief, page 27. Moisture from the air will condense any time the temperature of the air is cooled below its dew point. It is true that the temperature of the hatch coaming, being in the outer air, was higher than the temperature of the air in hold, but when the cold

air from the hold contacted the warmer hatch coaming it cooled it to a temperature below the dew point of the air surrounding the hatch coaming.

The only direct evidence introduced on the question of the frost was the testimony of the eye witness quoted above who testified that on the night respondent Williams was injured, he himself saw frost on the pertinent area. The testimony of an engineer, referred to by petitioner on page 28 of its brief, was not direct testimony at all. As petitioner admits, this engineer testified only as to what he found to have happened long after the injury under what he considered to have been circumstances similar to those existing when the injury took place. This is not direct testimony. It is only testimony from which the jury might have inferred that there was no frost when respondent Williams fell. The jury did not choose to so infer, however, and found adversely to the petitioner, based upon the direct testimony that frost existed and the testimony from which it could reasonably be inferred that the frost existed.*

The only direct testimony on the question of frost tended to establish the presence of the frost. Therefore, if the decision in *Penna. R. Co. v. Chamberlain,* supra, applies at all, it must be held to deny that the jury could reasonably have found that no frost existed. Certainly, the verdict of the jury and the decision of the court below was not contrary to the ruling of that case.

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*For another icing case in an allied field, F.E.L.A., where the Court of Appeals for the 9th Circuit resolved factual questions on negligence for the trier of facts, see *Fugazzi v. Southern Pac. Co.*, 208 Fed. 2nd 205 (1953).

CONCLUSION

We have extended this brief to considerable length because we feel it important to show the actual meaning of every case relied upon by the petitioner. This requires a full discussion of each case.

The petition fails to show any reason for granting the writ of certiorari prayed for. An analysis of the questions propounded by the petition and the relevant legal materials discloses:

(1) the decision below is not in conflict with any decision of this Court or any other court of appeals;

(2) no right of the litigants actually depends upon any question propounded; and

(3) the questions propounded are not actually reached under the facts of the case.

Therefore, it is respectfully submitted that the petition for writ of certiorari prayed for should be denied.

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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 268

PACIFIC FAR EAST LINE, INC.,
Petitioner,

vs.

JOHN WILLIAMS,
Respondent.

Reply of Petitioner Pacific Far East Line, Inc. to Answer to Petition Filed by Respondent

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In respondent's answer to petition of Pacific Far East Line, Inc. there are several unjustified statements of fact contained in the opening statement. Some have no support whatsoever in the evidence and some are not justified because of the lack of substantial evidence to support them. In order to avoid to a large extent interference with the continuity of this reply brief such statements will be referred to in the appendix and generally dealt with there, with appropriate references to or quotations from the record. However, where it appears necessary there will be discussion of the facts in connection with points of law and other contentions dealt with below.

Points made by respondent in his answer to the petition will be taken up in general in the order in which they are made.

FIRST QUESTION PRESENTED FOR REVIEW: THE SCOPE AND APPLICABILITY OF THE RULE PERTAINING TO TRANSITORY CONDITIONS

As we understand the position advanced by respondent in his answer to the petition for certiorari on this question, it is that the transitory condition rule cannot be applied here because the appliances furnished, viz., the cargo lights, were inadequate and that such inadequacy is not of a transitory nature. The short answer to this contention is that there is no evidence in the record to support it. To paraphrase the language of the court in *Poignant v. United States*, 225 F.2d 595 (2d Cir. 1955), there is no evidence in the record that the FLEETWOOD was not as fit for service as similar vessels in similar service, or that comparable vessels are customarily provided with cargo lights of some other or better character.

The direct evidence and reasonable inferences in this regard are all to the contrary. The placement and use of the cargo lights furnished the longshoremen on the FLEETWOOD were the subject of pointed and detailed testimony by no less than seven witnesses, including Williams, two of his fellow longshoremen, the winch driver, the gang boss, the chief mate and the night mate. All of these witnesses indicated their familiarity with cargo lights of the type furnished by the FLEETWOOD and none of them testified that such lights were not the usual and customary cargo lights used by vessels in such work, or that they were unsatisfactory in any respect.

Every effort of counsel for plaintiff during the trial to develop evidence designed to cast doubt on the cargo lights as to fitness failed. These efforts were in three directions.

(1) Questions were asked which were designed to elicit testimony that the lights would overheat and burn the hands of a person holding them while directing light on work in progress. The witnesses being questioned answered, however, that the lights could be and were held by hand and light directed where needed (R. 179). Other witnesses also testified without qualification that it is common practice for these lights to be held by longshoremen for the purpose of furnishing light for such work (R. 272, 278, 99, 119, 166). Furthermore, there was uncontradicted testimony that longshoremen working in freezer hatches wear heavy gloves which would protect their hands from the cold but would obviously serve also to protect them from heat, if necessary (R. 187).

(2) Questions were asked designed to develop testimony that the cargo lights furnished by the FLEETWOOD might shine in a worker's eyes. Obviously, such a criticism of ships' lights could be made to some extent of all lights; especially to fixed ones. But there is no evidence that similar vessels in similar work furnish anything other than similar portable lights. Furthermore, there is no reason why Williams and his partner who were working at hooking the sling on plugs should look toward the light if it had been hung on the offshore side of the railing, or, if the light were being handled by a longshoreman, why he would shine it in the men's eyes who were working on top of the plugs. These men would obviously be looking down while hooking on; and Williams would be above, or his head would be at most not lower than, the level of any light on the off-shore rail or in the hands of a longshoreman when stepping down

from the top of the coaming in returning to the hatch area. It is possible that a light held in someone's hand would be carelessly shone into the eyes of some other person or that such other person would carelessly look directly into a light and have his vision temporarily impaired. But, there is no evidence that a cargo light could not be handled without being shone into someone's eyes if care be exercised by the operator, or that a worker would have to look directly at the light if exercising ordinary care. The possibility that someone might carelessly handle an ordinary device or simple appurtenance of this type does not make the appliance or appurtenance unseaworthy, or establish that it was not reasonably fit.

(3) The third approach attempted by counsel for plaintiff was to suggest by questions that there was no safe place (from a property damage standpoint) to hang the cargo lights so that they would illuminate the work area and that the cargo lights were therefore inadequate. The fact that the lights can be and often are held in the hands of fellow workmen and directed on the work Williams was doing renders this point, even if established, immaterial.

Moreover, the only objection voiced by any witness to hanging or placing any of these lights in various locations was the danger that the lights themselves might be damaged during the course of removing the hatch plugs. While this solicitude for vessel's property may be commended, it is needless, since the evidence shows without contradiction that the lights could be hung on the off-shore end of the guardrail without substantial danger of damage—certainly when only the key or center plug (the one here involved) had been removed; and, in fact, up to the time all other plugs had been removed with the possible exception of the

last off-shore plug (R. 163, 164, 181, 188, 190, 273, 281). And, when that had been hooked onto, Williams and his partner would have stepped over the coaming onto the deck (R. 318). The evidence shows that, if properly hung, the cargo lights may even be installed on the inshore rail (R. 188). The evidence is also uncontradicted that cargo lights such as these are commonly hung in such locations; and one witness, when asked the direct question, testified that he had never known of any light having been damaged as a result (R. 273). No witness testified that any cargo light had been damaged from having been placed in such location.

We need not comment at length on the protracted discussion of cases appearing in respondent's answer to the petition. Among other things, respondent appears to suggest that the transitory condition rule, as established by *Cookingham v. United States*, 184 Fed. 2d 213; 1950 A.M.C. 1793, cert. denied 340 U.S. 935 (1950), and the numerous other cases cited in the petition, are in any event not applicable to the facts of this case, since the judgment could have been based on negligence, as well as unseaworthiness. This suggestion apparently overlooks the fact that both the *Cookingham* case and a number of the other cases cited in the petition involved both negligence and unseaworthiness. The error into which respondent has fallen is in failing to distingish between negligence and unseaworthiness (see, for example, respondent's discussion of *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 1954, which is based on the erroneous assumption that the decision involved a cause of action for negligence), and in failing to understand the nature of a cause of action for negligent failure to furnish a safe place to work. Since there is no evidence that the cargo lights furnished by shipowner were inherently defective or inadequate, nor evidence of any other negligent act of shipowner

causing or contributing to the lack of illumination which resulted in Williams' fall, the decision below must be based on the mere existence of the momentary lack of sufficient light as constituting an unseaworthy condition or a negligent failure to furnish a reasonably safe place to work. This is the transitory condition to which the principle announced in *Cookingham v. United States* must apply. We need not answer respondent's contention that, in any event, the mere existence of an unsafe condition constitutes culpable negligence. As a general proposition that is obviously not true. In this case there is no evidence that petitioner was the cause of any such unsafe condition; and, further, there is no evidence that the circumstances of any such act were such as to render it a negligent one. It is entirely wrong to assume, as does respondent, that any act causing an unsafe condition is a negligent act. Obviously, negligence depends on whether such act was reasonable under the circumstances.

Since the holdings of *Cookingham v. United States* and the other cases cited in the Petition are expressly applicable both to causes of action for unseaworthiness and for negligent failure to furnish a safe place to work under the general duty owed a business invitee, and since there is no evidence of any other culpable negligence of petitioner, there can be no escape from the impact of those decisions on this case.

SECOND QUESTION PRESENTED FOR REVIEW: LIABILITY OF SHIP OPERATOR WHO HAS FURNISHED ADEQUATE EQUIPMENT TO STEVEDORE ENGAGED IN LOADING VESSELS

On this question respondent argues essentially that the lighting equipment furnished, i.e., the cargo lights, were inadequate in that there was no "possible" way they could

be utilized to provide adequate lighting. The testimony regarding the adequacy of these cargo lights has been described in detail in an earlier portion of this brief, and in the appendix. Contrary to the assertion of respondent, there is no evidence that "there was no possible way this equipment could have been manipulated to provide adequate lighting." On the other hand, there is abundant testimony that the equipment provided can be and commonly is utilized to provide adequate lighting for this type of work (Chief Mate Wishard, R. 158, 159, 164, 166; Stevedore Gang Boss Walsh, R. 272, 273; Longshoreman Ray E. Stewart, R. 98). Respondent states that "The question of whether these cargo lights provided or could have provided sufficient illumination was sharply controverted." A reading of the record will disclose, however, that there was only an attempt made by counsel for respondent to controvert, and that no substantial testimony or other evidence was adduced that these lights could not have been adequately used to illuminate the work in progress; or were not the customary and usual cargo lights or the equal of lights provided for this use by other vessels engaged in similar calling.

THIRD QUESTION FOR REVIEW: FAILURE OF APPLIANCES TO BE OPERATED FOR PURPOSE INTENDED OR CUSTOMARY DOES NOT CONSTITUTE UNSEAWORTHINESS

Certain factual unsupported statements made by respondent in his brief have been indicated in the appendix.

Contrary to the statement of respondent, there is no testimony whatsoever "that had these lights been turned on they would have provided light in the area from which respondent Williams fell when he incurred his injuries." The only testimony was to the contrary (R. 330, 331). Whether the absence of such testimony can be overcome by an infer-

ence of fact to be left to the jury is a question which is discussed under the fourth question presented for review dealing generally with the sufficiency of evidence to support the judgment.

A further factual error should be pointed out here. On page 27 respondent asserts with reference to these lights that the area from which Williams fell was "only three or four feet away." It is not clear what this area was three or four feet away from. If respondent means from the nearest hold light, the testimony is that it was about 20 feet, since the lights in the wings are 10 feet away from the lower edge of the hatch coaming (R. 174), which edge is approximately 10 feet from the center of the hatch where the plug was removed (R. 238). The hold lights are also below the top of the hatch coaming a vertical distance of four feet (R. 241, 242, 243).

In any event there is no evidence whatsoever that these lights were designed, intended for lighting or customarily used to light the place from which Williams fell. All testimony on the point is to the contrary viz., that the lights are used to furnish illumination for the stowage of cargo in the wings of the ship's holds. However, if these lights were not on during the removal of the hatch plugs when respondent contends they should have been on, then there was a failure on the part of the longshoremen to make use of an available appliance, by either turning the lights on in the resistor house where the winches were located within a few feet of the winch platform or having the night mate turn them on when the longshoremen wanted to use them. It is common knowledge and the evidence is uncontradicted that when longshoremen want lighting equipment which is available they ask for it (R. 120, 121, 125, 177, 274, 351).

It is, of course, quite true as respondent suggests that even if petitioner is not liable because of the failure of these hold lights to be on at the critical moment, it may still be liable if the cargo lights furnished were inadequate or defective. This is a separate question and is covered by the discussion of the first and second questions presented for review. It is significant to note, however, that in respondent's discussion of the combined effect of these questions he states the basis for the decision in the court below to be that inadequate illumination at the time and place of the accident constitutes unseaworthiness. The passage referred to is at page 25 where respondent asserts that petitioner's actions "created *a condition of inadequate lighting and therefore unseaworthiness.* The failure to turn on the hold light was not the basis of the decision below. *The basis of the decision was the failure to provide adequate lighting* and the failure to turn on the hold lights was simply one cause of this condition." (Emphasis added.) The word "lighting" used here does not refer to any defective or inadequate equipment or appliance but to the fact that there was insufficient illumination at the time and the place of the accident. This is the precise transitory condition to which, petitioner contends, the principles of *Cookingham v. United States, supra,* are applicable.

FOURTH QUESTION PRESENTED FOR REVIEW: SUFFICIENCY OF THE EVIDENCE ADDUCED BY PLAINTIFF ON ESSENTIAL ISSUES IN THE CASE

With respect to the position of respondent that the jury is permitted to infer that the hold lights, if they had been on, would have cast sufficient illumination on the hatch coaming to help substantially in revealing to appellee the slippery condition of the surface on which he was about

to step, petitioner is content to rely on *Penna. R. Co. v. Chamberlain*, 288 U.S. 333 (1933). Respondent states that there was no positive testimony that if the hold lights had been on at the time of the injury they would not have cast light upon the area from which respondent Williams fell. Yet no testimony could be more positive than that of the witness who observed the functioning of the lights and saw that turning them on did not increase illumination at the point in question. This is the testimony of witness Goedewaggen (R. 331). Respondent himself suggests that the question of whether the hold lights would illuminate the ladder as set forth above is one as to which no testimony could be strong enough to overcome an inference that such illumination would be cast. It is submitted that the rule of the *Chamberlain* case is literally and precisely applicable to this situation and that a contrary ruling would render the substantial evidence rule applied in the Federal courts virtually nonexistent. In short, there can be no factual issue as to which the jury is to be permitted to draw its own inference in the face of positive and otherwise uncontradicted contrary testimony of unimpeached witnesses consistent with the facts actually proved.

Respondent seeks to show that there was substantial evidence showing that frost had formed on the first rung of the ladder just below the top of the coaming where Williams was about to step.

There is not sufficient evidence to meet the substantial evidence rule; either

(1) That there was frost on the first rung a very short distance below the top of the hatch coaming, or

(2) That plaintiff had slipped from such rung.

Respondent cites the testimony of one witness, Houston Hall, in support of his assertion that frost had formed in the area involved. A reading of Houston Hall's testimony (R. 141) will show that when he spoke of frost or fog he was referring to that area where there was a lip on which the plugs rested. His testimony preceding that quoted by respondent at page 34 of his brief was as follows:

> "Q. You mean this lip—you mean that is sometimes called the ledge?
>
> A. That's the coaming, *that is where the plug fits*, and there's about an inch and probably two inches of, to fit up on." (Emphasis added.)

Further, the quotation from Hall's testimony on page 34 of respondent's brief is expressly based on the erroneous assumption of the witness that the ship's blowers were on and would blow cold air up on to the face of the coaming. The witness said in this respect: "Naturally, that pressure from the fan blows up and it blows that cold air, stuff, out and it forms". He also testified that he did not "observe" whether the blowers were on or off (R. 142). The uncontradicted evidence is that the blowers were turned off approximately 15 minutes before the accident happened. The log book entry shows that they were turned off about 1:00 o'clock and the evidence is that the accident happened about 1:15 (R. 117).

Furthermore, this witness did not arrive at a point where he could see into the hatch area until a short time after Williams had fallen, and made no distinction between frost and fog. He testified:

> "Q. Is that where you saw the frost?
>
> A. I saw it up here, it was *forming*, you know, the *fog*."

No help was obtained from plaintiff's expert because he did not testify as to what distance frost would form above the top of the freeze compartment within the time involved, namely, less than 60 seconds after the key plug was removed. The distance from the top of the freeze hold to the top rung of the ladder on the face of the coaming was nearly 3 feet (R. 240, 241, 242). If any presumption is to be raised in regard to plaintiff's testimony it would be that frost would only form within so short a space of time in the immediate vicinity of the point of contact between the top of the freeze hold and the warmer air above. Furthermore, there is uncontradicted testimony by Mr. Goedewaggen who made tests under almost identical conditions over a period of several minutes, both with the blowers on and off, that the temperatures recorded were many degrees above the freezing point (R. 323-329).

Respondent herein (plaintiff below) went to great pains to try to prove there was frost on the top rung of the ladder; even to the extent of calling an expert and strenuously defended his position in that regard in the Court of Appeals. But now— apparently realizing that there is a failure of proof—takes the position that proof of that is not necessary to his case. Respondent also took great pains to show that it was on the top rung of the ladder that plaintiff slipped. We think likewise that plaintiff's sudden concession as to frost should be applied to his proof as to whether plaintiff's foot, his right one, with which he was stepping down, had reached an allegedly ice-coated rung. If it was the foot which was still on the coaming which slipped, then plaintiff must concede he has failed to meet the burden of proof because no evidence was introduced to show, and no contention was ever made, that there was insufficient light on the top of the coaming.

The Court of Appeals, as indicated by language in its opinion, was not pursuaded that plaintiff produced any substantial evidence that the foot he was stepping with had reached the top step or bar of the ladder on the face of the coaming. The opinion reads "He stepped back and down with one foot, *seeking* to step onto a bar affixed within a recess in the coaming above the space where the plug had been. He slipped * * *" A careful reading of plaintiff's testimony in the record will show that statement to be correct.

What plaintiff undertook to prove in the trial court and contended was proved before the Court of Appeals was that plaintiff was subjected to unusual danger because of the formation of ice or frost on the top rung of the ladder and that there was insufficient light to enable plaintiff to become aware of the danger. Respondent now in effect concedes that he has not met the burden in respect to one essential of his case. The existence of ice or frost at the place from which Williams fell, and the inference that he slipped thereon, is an essential of respondent's case. Even though the ice or frost is not the claimed unseaworthiness on which respondent bases liability, nevertheless it must at least be found to be a dangerous condition requiring adequate lighting to discover; if not, the claimed inadequate lighting would likewise be immaterial. All of the cases concerning inadequate light, or lighting equipment, as an unseaworthiness involve a dangerous condition which the lack of adequate lighting was alleged to have failed to illuminate. Examples are *Adamowski v. Gulf Oil Corporation*, 197 F.2d 523 (3d Cir. 1952), 1952 A.M.C. 1221, affirming 93 F. Supp. 115 (E.D. Pa. 1950), 1950 A.M.C. 2079, cert. denied 343 U.S. 906 (1952); *Brabazon v. Belships Co.*, 202 F.2d 904 (3d Cir. 1953), 1953 A.M.C. 737.

No reply has been made to all respondent's assertions or contentions—only to those which seem to have some substantial bearing on the granting of the writ and which were not fully covered in the petition.

It is respectfully submitted that the petition for writ of certiorari prayed for should be granted.

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(Appendix Follows)

Appendix

STATEMENTS OF RESPONDENT IN REGARD TO THE FACTS

1. Respondent asserts in page 2 of his brief that West Coast Terminals (the stevedore company) by agreement with Pacific Far East Line furnished longshoremen to load the steamship FLEETWOOD after first stating that John Williams, a longshoreman, was employed by West Coast Terminals. The latter statement is correct; but there is no evidence whatsoever that the stevedore company, pursuant to any agreement, furnished longshoremen to Pacific Far East Line. There was never any question in the case that an independent stevedore company did the loading of the vessel. This is evidenced by the following instruction given by the trial court to the jury:

> "You are instructed that the actual loading operations of the vessel were being done by the stevedoring company, the West Coast Terminals, Inc., and their employees, the longshoremen. If the defendant's duty to furnish a seaworthy vessel, together with seaworthy equipment and appliances, and its duty to provide a reasonably safe place to work, has been fulfilled, and thereafter, without the knowledge of the ship operator, the stevedores negligently or improperly used, handled or rigged such equipment and appliances, the ship operator, the defendant in this case, is not liable for the consequences."

And the evidence amply justifies such an instruction.

2. The assertion that "there is no evidence as to where his [Williams'] partner went" is contrary to uncontradicted evidence of the winch driver who was in an excellent position in which to observe. Immediately after Williams fell he testified that he saw Williams' partner standing to his left "on the offshore side of the place where you had removed the plug" (R. 315).

3. Respondent states that the overhead (ceiling) lights in the hold "throw light up on the ladder." There is no reference to any testimony to that effect and there could be none. The night mate testified in part as follows (R. 120):

> "Q. (By Mr. Chandler): The lights I am referring to, I am sorry, the lights I am referring to are the lights down in the holds, these lights we have been talking about.
>
> A. There are lights down in the hold. They don't need them until they get the hatch off, and come down to go to work. They wouldn't help them a bit to take the hatches off."

* * * * * * *

(R. 121):

> "Q. (By Mr. Chandler): Have you observed, have you ever observed the lights down in the holds here providing light up on these steps when the key plug is removed?
>
> A. No, I can't say that I have seen that, no, whether they shine up there or not, I don't—wouldn't be able to say that. I don't—I don't see how—they can't shine up too much anyhow."

Another witness testified that he made personal observations on the same ship with the ceiling lights on and off and could see no difference in the amount of light on the coaming in either case (R. 331). Furthermore, from a purely physical standpoint, the light could not be cast where Williams would step or was about to step in climbing down because any light reflected from below would come from underneath the steps and not from the top.

Respondent further states that these hold lights "were not turned on." While there is evidence in the record that the hold lights were not burning at the time of the accident, there is no substantial evidence that they were not "turned

on." It does not appear in the record what was the cause of the failure of the hold lights to be illuminated at the time of the accident. While the night mate who was on duty after midnight of the night in question testified that he did not order those lights to be turned on at 1 o'clock, there was no testimony in the record that the lights had been turned off at midnight. On the contrary the night mate who was on duty until midnight testified that he did not order those ceiling lights turned off at midnight and, in fact, that those lights are not ordinarily ever turned off when the vessel is in port.

4. Respondent asserts that the cargo lights in question were "uninsulated." There is no evidence in the record that those lights, or any part thereof, were uninsulated. Indeed the sole attempt to elicit testimony bearing on this point resulted in testimony that the lights could be held in the operator's bare hands without his being burned (R. 179). All other testimony concerning the holding of these lights in the hands of longshoremen for the purpose of directing the lights where desired was that it could be and often was done (R. 99, 159, 166, 272, 273). Furthermore, there was uncontradicted evidence that longshoremen working in freeze hatches such as the one in question wore heavy gloves (R. 189). Significantly, there was also uncontradicted testimony that one of the lights was picked up by one of the longshoremen immediately after the mishap and shone down into the hold (R. 129, 138, 139).

5. Respondent asserts that the cargo lights could not be lashed to the guardrail which runs across the forward edge of the hold because there is "an ever present danger that it may be smashed by a swinging plug if this is done." While there is evidence in the record that the lights might be damaged if they were hung on the inshore end of that

rail, there was uncontradicted evidence that the lights could be lashed on the offshore end of the railing without being smashed and that this was commonly done (R. 163, 181, 190, 273, 281). Furthermore, there was uncontradicted evidence that such a light could be hung even on the inshore end of the guardrail if it were lashed on the forward side thereof in such a manner as not to project out into the possible path of the plugs as they were being moved to one side (R. 188).

6. Respondent states that it "would be almost impossible to hold" a cargo light in such fashion as to give effective light and not run into real danger of temporarily blinding one of the "constantly moving longshoremen * * * or the winch driver." There is no such testimony. In fact there is no testimony that it would be even difficult to make effective use of the cargo lights, particularly if such a light were handled by a longshoreman. The testimony is uncontradicted that longshoremen often did just that; and as indicated above, that was done immediately after the mishap. Obviously, if one looks directly into a powerful light his vision would be interfered with for a time. That would be true of any light, including the masthead light which is used when there is no Seattle tent. And there is no necessity whatsoever to look into the light if hung or used in a proper manner. Necessarily, when the two men were hooking on to the plugs they would be looking down and there would be no occasion to look at the light at any time, including the time Williams was climbing into the area when his head would be above the light, or at most, on a level with it.